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REVISITING STANDARDS OF REVIEW IN CIVIL APPEALS

W. WENDELL HALL*

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* B.A., University of Texas at Austin; J.D., St. Mary's University School of Law. Partner, Fulbright & Jaworski, L.L.P. The author gratefully acknowledges the patience and diligence of Diana S. Reyes, legal secretary, in preparing this article for publication.

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I. INTRODUCTION

In revisiting standards of civil appellate review, this Article is a substantial and comprehensive update of standards of review in Texas civil appellate litigation, focusing on trial courts' rulings on pretrial, trial, and posttrial proceedings.[1] This Article includes many other categories of trial court rulings, as well as the applicable standard of review. Additionally, the Article includes all substantive changes to decisional law and to the Texas Rules of Civil and Appellate Procedure. While standards of review are easy to define, their application on appeal can be problematic. Nevertheless, defining and applying the appropriate standard will generally determine the likelihood of success of the appeal.

"Standards of review represent a distribution of political power within the judicial branch: standards of review define the relationship between trial and appellate courts."[2] Accordingly, standards of re-

1. W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865 (1990).

2. Roger Townsend et al., *Standards of Review and Reversible Error: State and Federal Court*, *in* UNIVERSITY OF TEX. TECHNIQUES FOR HANDLING APPEALS IN STATE & FEDERAL COURT 8-8 (1991).

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view define the parameters of a reviewing court's authority to determine whether a trial court has erred, and whether the error warrants reversal. As a leading scholar has observed, "Standards of review were never meant to be the end of the inquiry, but rather a frame and a limit on the substantive law."[3] Thus, the standard of review is the appellate judge's "measuring stick."[4] A litigant must, therefore, analyze his or her factual and legal arguments in light of the appropriate standard of review, or "measuring stick," to write an effective and persuasive brief.

It is difficult to overstate the practical significance of the standard of review. Because the appropriate standard of review and scope of review generally determine the outcome of an appeal, a litigant must shape factual and legal arguments in a manner that will satisfy the relevant standard as applied to the relevant evidence. The standard of review should be carefully distinguished from the scope of review. The applicable standard of review determines whether the trial court has committed an error. The scope of review defines what the reviewing court will examine to determine whether the trial court has committed an error. In other words, the scope of review defines what part of the record is relevant to a particular appellate complaint. While identification of the appropriate standard of review is very important, a litigant must do more than simply recite the relevant standard in the brief. Instead, the litigant must apply the standard of review to the facts (scope of review) and the substantive law in a manner that will convince the reviewing court that the case warrants reversal. One case decided by the Seventh Circuit demonstrates how difficult, and yet how important, it is to convince a reviewing court that the standard, as applied to the facts, requires reversal: In determining whether a trial court's decision was clearly erroneous, the court observed that the "decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish."[5] When a litigant is held to that standard, it is clear that a great deal of thought and preparation is

3. STEVEN A. CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW § 1.3, at 21 (1986).

4. John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 4 FIFTH CIRCUIT REPORTER 161, 169 (Jan. 1987).

5. Parts & Elec. Motors, Inc. v. Sterling Elec., 866 F.2d 228, 233 (7th Cir. 1988).

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required to convince a reviewing court that the trial court's decision was in error, and that the error warrants reversal.

The litigant who ignores the standard of review merely loses credibility with the reviewing court. If a party does not identify the relevant standard and vigorously approach the standard in his or her brief, the litigant leaves a void in the brief that will be necessarily filled by his adversary, the reviewing court, or the court's clerks. Because the reviewing court will undoubtedly determine the relevant standard on its own and review the appeal accordingly, only naïve litigants avoid the standard, thereby missing the opportunity to persuade the reviewing court that the standard, as applied to the facts and the law, requires reversal.

While the standard of review may be easily identified, the application of the standard to a case often presents a difficult hurdle. For example, while the abuse of discretion standard is the most common standard of review, its application to the relevant record (scope of review) presents tremendous problems to litigants and reviewing courts. As one appellate court judge has observed, the abuse of discretion standard "means everything and nothing at the same time."[6] While the words used to describe standards of review often escape a clear and precise definition, "[t]here are no talismanic words that can avoid the process of judgment."[7]

Undoubtedly, some standards of review escape precise definition. Nevertheless, unless a litigant "is familiar with the standard of review for each issue, he may find himself trying to run for a touchdown when basketball rules are in effect."[8] It is hoped this Article will provide to litigants and the courts the correct rules for reviewing orders and judgments of a trial court.

II. ABUSE OF DISCRETION STANDARD OF REVIEW

A. *Abuse of Discretion on Appeal*

Perhaps no standard of review is so misunderstood—and so wrongly overused—as the abuse of discretion standard. Some decisions chant it almost talismanically to affirm the lower court when the

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6. Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 935 (Tex. App.—Austin 1987, no writ).

7. Universal Camera Work v. NLRB, 340 U.S. 474, 489 (1981).

8. John C. Godbold, 4 *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, FIFTH CIRCUIT REPORTER at 169.

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question presented on appeal appears to be a question of law. Certainly, the review of a legal question must be de novo, inasmuch as the primary function of trial courts is to find facts while that of appellate courts is to declare law.

Theoretically, a conclusion that the trial court abused its discretion should not be read as an insult to the lower judge. As one federal court noted, "Abuse of discretion is a phrase which sounds worse than it really is."[9] Abuse of discretion simply means that a higher court disagrees with the lower court's action, but the higher court is required to use that terminology in explaining the disagreement.

What is an "abuse of discretion?" Even when the abuse of discretion standard is confined to its proper sphere, appellate courts have understandable difficulty in applying it consistently. This difficulty is inherent in the standard itself. The amorphous concept of abuse of discretion aids neither appellate courts nor trial courts in deciding cases. It also makes briefing difficult for appellate counsel.

It has been said that "abuse of discretion" is a concept "not easily defined."[10] "[J]udicial attempts to define the concept almost routinely take the form of merely substituting other terms that are equally unrefined, variable, subjective and conclusory."[11] The test is not whether the facts present an appropriate case for the trial court's action;[12] but, instead, whether the trial court acted without reference to any guiding rules and principles, or in other words, acted in an arbitrary or unreasonable manner.[13] When an attempt is made to apply this definition, however, it becomes clear that this definition is circular: a court could refer to guiding rules and principles, decide to act directly contrary to them, and yet not "abuse" its discretion; similarly, an act that is arbitrary, capricious, or unreasonable must constitute an abuse of discretion.

The mere fact that a trial court may decide a matter within its dis-

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9. *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954); *see also* Pearson v. Dennison, 353 F.2d 24, 28 n.6 (9th Cir. 1965) (commenting that pejorative connotation of "abuse of discretion" may be lessened by reframing test as "misuse of discretion").

10. Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 934 (Tex. App.—Austin 1987, no writ).

11. *Id.* at 934.

12. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986).

13. *Id.* at 241-42; *see also* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984); Landry v. Traveler's Ins. Co., 458 S.W.2d 649, 651 (Tex. 1970); Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939).

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cretionary authority differently from what a reviewing court would decide in similar circumstances does not demonstrate that an abuse of discretion has occurred.[14] A mere error of judgment is not an abuse of discretion.[15]

Thus, the abuse of discretion standard requires a common-sense combination of these definitions. By requiring that the trial court's conduct has been arbitrary, capricious, or unreasonable, appellate courts acknowledge the discretion the trial court must have to judge the credibility of witnesses and make decisions within broad legal parameters. At the same time, though, it is only through the requirement that the trial court refer also to guiding rules and principles that the appellate court can ensure that the trial court has acted reasonably. The trial court's action could have been reasonable and, therefore, not an abuse of discretion, *only* if it exercised its discretion within the correct legal parameters.

Perhaps the best description of an abuse of discretion is the observation that it is the exercise of a "vested power in a manner that is contrary to law or reason."[16] In *Landon v. Jean-Paul Budinger, Inc.*,[17] Justice Powers explained in detail the amorphous abuse of discretion standard.[18] Justice Powers's opinion provides a great deal of insight into the dilemma often faced by the reviewing courts in determining whether a particular act of the trial court amounts to an abuse of discretion. Justice Powers recommended the following analysis:

> (1) Was the determination complained of on appeal a matter committed by law to the trial court's discretion?
> (2) Did the trial court, in making the determination complained of on appeal, recognize and purport to act in an exercise of the discretion committed to it by law?
> (3) Does the appellate record reveal sufficient facts upon which the trial court could act rationally in an exercise of its discretion?
> (4) Did the trial court exercise erroneously the discretion committed to it by law?[19]

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14. *Downer*, 701 S.W.2d 242 (citing Southwestern Bell Tel. Co. v. Johnson, 389 S.W.2d 645, 648 (Tex. 1965)); Jones v. Stryhorn., 159 Tex. 421, 428, 321 S.W.2d 290, 295 (1959)).

15. Loftin v. Martin, 776 S.W.2d 145, 146 (Tex. 1989, orig. proceeding); Toyota Motor Sales, U.S.A., Inc. v. Heard, 774 S.W.2d 316, 319 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding [leave denied]).

16. *Landon*, 724 S.W.2d at 935.

17. 724 S.W.2d 931, 934 (Tex. App.—Austin 1987, no writ).

18. *Id.* at 934-41.

19. *Id.* at 937-39.

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Justice Powers suggested that an analysis of the appellate record in this manner is "more practical, logical, illuminating and consistent with the important purposes the abuse of discretion standard is meant to serve."[20]

Subsequently, in *Reyna v. Reyna*,[21] Justice Powers recited, in a slightly different manner, four ways in which a trial court's exercise of discretion is legally erroneous:

> First, a court commits legal error if it attempts to exercise a power of discretion that it does not legally possess. . . . Second, [a] court commits legal error if it declines to exercise a power of discretion to it by law when the circumstances require that the power be exercised . . . . Third, [a] court commits legal error if it purports to exercise its discretion without sufficient information upon which a rational decision may be made, as reflected in the appellate record. . . . Fourth, a court commits legal error if it exercises its power of discretion by making an erroneous choice as a matter of law, in any one of the following ways: (a) by making a choice that was not within the range of choices permitted the court by law; (b) by arriving at its choice in violation of an applicable legal rule, principle, or criterion; or (c) by making a choice that was legally unreasonable in the factual-legal context in which it was made.[22]

B. *Abuse of Discretion in Mandamus Proceedings*

Because the abuse of discretion standard applies in both appeals and mandamus actions,[23] the question arises whether there is any distinction between the standard of review on appeal and the standard required for the issuance of mandamus. Clearly, the concept of reversible error is removed in a mandamus action; indeed, the basis for a mandamus proceeding is the appellant's (relator's) probable inability to show reversible error if relegated to an appeal. The Texas Supreme Court has held, moreover, that a party is not required to pursue the remedy of mandamus to preserve the right to complain on appeal about discovery rulings.[24] Thus, mandamus is not required to

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20. *Id.* at 937.

21. 738 S.W.2d 772 (Tex. App.—Austin 1987, no writ).

22. *Id.* at 774-75.

23. In Walker v. Packer, the supreme court reaffirmed that a relator must show (1) that the trial court's action constitutes a clear abuse of discretion, and (2) that he has no adequate remedy by appeal. Walker v. Packer, 827 S.W.2d 833, 839-42 (Tex. 1992, orig. proceeding); *see* National Tank Co. v. 30th Judicial Dist. Court, 36 Tex. Sup. Ct. J. 715, 716 (Apr. 7, 1993, orig. proceeding) (restating two-part test in Walker v. Packer).

24. *See* Pope v. Stephenson, 787 S.W.2d 953, 954 (Tex. 1990).

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preserve a complaint for appellate review; however, mandamus may be necessary to present a record showing that any error is reversible.

With regard to whether "error" has in fact occurred for purposes of mandamus, the cases provide that mandamus will issue only for a "clear" abuse of discretion,[25] while the standard of review on appeal is couched in terms of a simple abuse of discretion, without any requirement that the abuse be "clear."[26]

In *Johnson v. Fourth Court of Appeals*,[27] and subsequently in *Walker v. Packer*,[28] both mandamus cases, the Texas Supreme Court held that an abuse of discretion occurs whenever the trial court's action is "so arbitrary and unreasonable as to be a clear and prejudicial error of law." In *Walker*, the court observed that the standard has "different applications in different circumstances."[29] With respect to the resolution of factual matters, the relator must establish that the trial court could have reasonably reached only one decision.[30] The trial court's decision must be arbitrary and unreasonable.[31] Mandamus review of a trial court's determination of the controlling legal principles is "reviewed with limited deference to the trial court."[32] Therefore, when a trial court fails to analyze or apply the law correctly or interprets the law erroneously, the trial court commits a clear abuse of discretion.[33]

Unlike the test for abuse of discretion on appeal, when the record is silent as to the facts that would show the reasons for the court's ruling, the relator will have failed to show a "clear" abuse of discretion. Since Texas Rule of Appellate Procedure 81 does not apply to mandamus actions, the trial court is probably not required to identify the rules and principles upon which it relied.

By contrast, if "abuse of discretion" was a single standard, no advo-

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25. *See Walker*, 827 S.W.2d at 839 (noting that supreme court has used writ of mandamus to correct "clear abuse of discretion" committed by trial court).

26. *Compare* Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987) (requiring only abuse of discretion); *with* Barker v. Dunham, 551 S.W.2d 41, 42 (Tex. 1977) (requiring clear abuse of discretion).

27. 700 S.W.2d 916, 917 (Tex. 1985, orig. proceeding).

28. 827 S.W.2d 833, 839 (Tex. 1992, orig. proceeding).

29. *Id.*

30. *Id.* at 839-40. Factual disputes may not be resolved in a mandamus proceeding. Dikeman v. Snell, 490 S.W.2d 183, 187 (Tex. 1973).

31. *Walker*, 827 S.W.2d at 840.

32. *Id.*

33. *Id.*

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cate could ever show a "clear" abuse of discretion. An "arbitrary, capricious, and irrational" decision remains so, no matter how "clear" it may be: zero times zero equals zero, just as 100 times zero equals zero. In either situation, the trial court abused its discretion, regardless of whether the trial court's action was "clear" abuse, or just abuse of discretion.

Despite these technical, theoretical possibilities, practical concerns suggest a uniform standard of review for abuse of discretion in both mandamus proceedings and appeals. Mandamus may better provide meaningful relief when there is no adequate remedy by appeal *only* if the test for abuse of discretion is the same for both mandamus and appeal. Otherwise, a party could be deprived of relief by mandamus for inability to meet the higher standard of review—the "clear" abuse of discretion standard. If mandamus is denied and the party later receives an adverse judgment, he can then appeal from the very same ruling about which he complained by petitioning the court for writ of mandamus. The standard of appellate review, however, would be based on *Downer v. Aquamarine Operators, Inc.*[34] On appellate review, the party could meet the lower standard (abuse of discretion), but would have been deprived of real relief, since the predicate for seeking mandamus was the absence of an adequate remedy by appeal. And in the subsequent appeal, the party would be required to demonstrate harm in the usual manner. This anomaly is a true "Catch-22." Consequently, the real issue is how to define the single standard; it comes down to a policy choice for the supreme court as to which standard of review best serves one system of justice.

III. REVERSIBLE ERROR

A. *Preservation of Complaints and the Issue of Harm*

The question of preservation of complaints and waiver must be carefully distinguished from the question of harm on appeal from an erroneous ruling. The fact that a party failed to preserve a complaint, or expressly waived it, does not lessen the harm from an error. Appellate advocates and courts should be careful to analyze first the case in terms of waiver, rather than harmless error. Indeed, unless the court wants to make alternative holdings, a court that holds the complaint was not preserved need never reach the separate second ques-

34. 701 S.W.2d 238, 242 (Tex. 1985).

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tion of whether any error in fact occurred below, or the distinct third question of whether any error was reversible.

B. *Reversible Error and Harmless Error*

Similarly, the question of harm from an error is analytically distinct from the question of whether error, in fact, occurred. Judges and advocates often confuse these terms and, thus, the law.

If a court decides that no error has been committed, it is not required to look further to determine whether any error would have been reversible. Of course, the court is free to make that alternative holding, but the option to write an opinion should not skew the court's original analysis of whether error in fact occurred in the trial court. A party can be grievously harmed by a trial court ruling that is perfectly correct under the law. Likewise, a trial court can make an error of the worst magnitude that has absolutely no effect on a party's rights. By keeping the two concepts of error and harm perfectly distinct, the appellate court will not only improve their own decision-making, but will make the handling of future appeals much easier for counsel and the courts. Similarly, by presenting the concepts separately, appellate lawyers can aid the court's decision-making and the future development of the law.

If no error exists under the applicable standard of review, the court can stop its inquiry unless it wishes to make alternative holdings. Only if the court finds error under the applicable standard of review must the court confront the concept of reversible error. The requirement of reversible error serves administrative policies by moving cases through the system. It also mitigates expense to the parties and taxpayers by not reversing cases for technical errors that in reality did not affect the outcome. Similarly, errors that made a difference, but did not cause an incorrect result, will not be grounds for reversal.

Before a judgment can be reversed and a new trial ordered on the ground that an error of law has been committed by the trial court, the reviewing court must find, pursuant to Texas Rule of Appellate Procedure 81(b), "that the error complained of amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment," or that the error probably prevented the appellant from properly presenting

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the case on appeal.[35] In determining whether an error is reversible error, the courts do not apply a "but for" test; instead, they apply a test of probability.[36] Various formulations of the test all reach the same end: Is it more likely than not—is it probable—that the preserved error caused an improper judgment?[37] If the reviewing court answers in the affirmative, then the error is reversible; if, on the other hand, the reviewing court answers in the negative, then the error is harmless.

The harmless error rule applies to *all* errors.[38] The reviewing court will review the record to determine if the complaining party received a materially unfair trial. If the complaining party failed to prove his cause of action or defense, the trial court's error could not have resulted in a materially unfair trial.[39] If, however, the trial is contested and the evidence is sharply conflicting, the trial court's error results in a materially unfair trial without showing more.[40] This is a judgment call entrusted to the sound discretion and good sense of the reviewing court after evaluating the whole case.[41]

C. *Fundamental Error*

Fundamental error is a rarity.[42] It "survives today only in those rare instances in which the record on appeal shows on its face that the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Texas Constitution."[43] Fundamental error may be raised for the first time

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35. TEX. R. APP. P. 81(b)(l); *see also* Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839-40 (Tex. 1979); Crown Plumbing, Inc. v. Petrozak, 751 S.W.2d 936, 940 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

36. Texas Power & Light Co. v. Hering, 148 Tex. 350, 352, 224 S.W.2d 191, 192 (1949).

37. *E.g.*, King v. Skelly, 452 S.W.2d 691, 696 (Tex. 1970); Aultman v. Dallas Ry. & Terminal Co., 152 Tex. 509, 516, 260 S.W.2d 596, 599 (1953).

38. Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 820 (Tex. 1980); Prezelski v. Christiansen, 775 S.W.2d 764, 768 n.4 (Tex. App.—San Antonio 1989), *rev'd on other grounds*, 782 S.W.2d 842 (Tex. 1990).

39. *Lorusso*, 603 S.W.2d at 821 (citing Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 921 (Tex. 1979)).

40. *Id.*

41. First Employees Ins. Co. v. Skinner, 646 S.W.2d 170, 172 (Tex. 1983).

42. American Gen. Fire & Casualty Co. v. Weinberg, 639 S.W.2d 688, 689 (Tex. 1982).

43. Central Educ. Agency v. Burke, 711 S.W.2d 7, 8 (Tex. 1986); Grounds v. Tolar Ind. Sch. Dist., 707 S.W.2d 889, 893 (Tex. 1986); Texas Indus. Traffic League v. Railroad Comm'n, 633 S.W.2d 821, 823 (Tex. 1982); Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982); Ramsey

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on appeal.[44]

D. *Cumulative Error*

Generally, when an appellant argues that a case should be reversed because of cumulative error, she is alleging that the trial court's errors, non-reversible or harmless errors individually, pervaded the trial, and "in the aggregate caused the rendition of an improper verdict."[45] Reversal based upon cumulative error is predicated upon meeting the standards of reversible error in Texas Rule of Appellate Procedure 81(b)(1).[46] That is, the errors complained of must "amount to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment or prevented the appellant from making a proper presentation of the case to the court."[47] The cumulative error doctrine, however, "has evolved almost exclusively in cases involving improper jury argument or jury misconduct."[48]

IV. PRETRIAL RULINGS

A. *Subject Matter Jurisdiction and Standing*

At a hearing on a plea to the jurisdiction, the trial court determines the issues of subject matter jurisdiction and standing solely by the allegations in the plaintiff's pleading, and the allegations must be taken as true.[49] Unless the petition affirmatively demonstrates an absence of jurisdiction, the trial court construes the petition liberally in

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v. Dunlop, 146 Tex. 196, 206, 205 S.W.2d 979, 985 (1947); Elbar, Inc. v. Claussen, 774 S.W.2d 45, 52 (Tex. App.—Dallas 1989, writ dism'd).

44. *Pirtle*, 629 S.W.2d at 920; McCauley v. Consolidated Underwriters, 157 Tex. 475, 478, 304 S.W.2d 265, 266 (1957); *Claussen*, 774 S.W.2d at 52.

45. McCormick v. Texas Commerce Bank Nat'l Ass'n, 751 S.W.2d 887, 892 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *see* Strange v. Treasure City, 608 S.W.2d 604, 609 (Tex. 1980) (considering whether cumulative effect of acts of misconduct resulted in injury).

46. TEX. R. APP. P. 81(b)(1); Mercy Hosp. v. Rios, 776 S.W.2d 626, 637 (Tex. App.—San Antonio 1989, writ denied); *McCormick*, 751 S.W.2d at 892.

47. *McCormick*, 751 S.W.2d at 892.

48. Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 809-10 (Tex. App.—Dallas 1987, no writ). *See generally* Jack Kenneth Dahlberg, *Analysis of Cumulative Error in the Harmless-Error Doctrine: A Case Study*, 12 TEX. TECH L. REV. 561 (1981) (noting that cumulative error frequently involves jury argument).

49. Texas Ass'n of Business v. Texas Air Control Bd., 36 Tex. Sup Ct. J. 607, 611 (Mar. 3, 1993); North Alamo Water Supply Corp. v. Texas Dep't of Health, 839 S.W.2d 455, 457 (Tex. App.—Austin 1992, writ denied); Goad v. Goad, 768 S.W.2d 356, 358 (Tex. App.—

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favor of jurisdiction.[50] If, however, a trial court lacks subject matter jurisdiction, it has no discretion and must dismiss the case.[51] A trial court's ruling when it lacks subject matter jurisdiction is fundamental error, which must be noted and reviewed by the appellate court at any time it appears.[52]

Whether a trial court has subject matter jurisdiction is a question of law reviewable by mandamus or appeal.[53] When reviewing an order of dismissal for want of jurisdiction, the reviewing court construes the pleadings in favor of the pleader in an effort to look to the pleader's intent.[54] Only matters presented to the trial court will be reviewed upon appeal from the order dismissing the case for want of jurisdiction.[55]

A court determines whether an individual has standing by analyzing whether there is a real controversy between the parties, which is determined by the judicial declaration sought.[56] An association has standing to sue on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[57] The standard of review applicable to subject matter jurisdiction applies to standing.[58]

Texarkana 1988), *cert. denied*, 493 U.S. 1021 (1990); Huston v. Federal Deposit Ins. Corp., 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e.).

50. Peek v. Equipment Serv. Co., 779 S.W.2d 802, 804 (Tex. 1989).

51. Qwest Microwave, Inc. v. Bedard, 756 S.W.2d 426, 440 (Tex. App.—Dallas 1987, orig. proceeding).

52. Texas Employment Comm'n v. International Union of Elect., Radio & Mach. Workers, 163 Tex. 135, 135, 352 S.W.2d 252, 253 (1961); Fincher v. City of Texarkana, 598 S.W.2d 22, 23 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.); *see* Rogers v. Clinton, 794 S.W.2d 9, 11 (Tex. 1990, orig. proceeding) (stating that court order made in absence of jurisdiction constituted abuse of discretion for which mandamus could issue).

53. *North Alamo Water Supply Corp.*, 839 S.W.2d at 457; *Qwest Microwave, Inc.*, 756 S.W.2d at 436.

54. *Texas Ass'n of Business*, 36 Tex. Sup. Ct. J. at 611; *Huston*, 663 S.W.2d at 129; Paradissis v. Royal Indem. Co., 496 S.W.2d 146, 148 (Tex. Civ. App.—Houston [14th Dist.] 1973), *aff'd*, 507 S.W.2d 526 (Tex. 1974).

55. *Huston*, 663 S.W.2d at 129 (citing *Paradissis*, 496 S.W.2d at 148).

56. *Texas Ass'n of Business*, 36 Tex. Sup. Ct. J. at 611; Board of Water Eng'g v. City of San Antonio, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955).

57. *Texas Ass'n of Business*, 36 Tex. Sup. Ct. J. at 611 (citing Hunt v. Washington St. Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

58. *Id.*

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B. *Special Appearance*

"By entering a special appearance pursuant to Texas Rule of Civil Procedure 120a, a nonresident bears the burden of proof to show his lack of amenability to long-arm process. . . ."[59] The nonresident defendant has the burden to negate all bases of personal jurisdiction the plaintiff alleged to support personal jurisdiction.[60] A trial court hearing a Rule 120a motion should "only consider arguments regarding the forum's jurisdiction over the defendant, and not any arguments concerning defects in service."[61] All of the evidence before the trial court on the question of personal or in rem jurisdiction is considered in determining the propriety of the trial court's ruling.[62] In one case, the supreme court exercised de novo review of the facts found by the trial court.[63]

C. *Venue*

In determining whether the trial court improperly transferred a case to another county under Rules 86 and 87,[64] the reviewing court must consider the entire record, including the trial on the merits.[65] Appellate review of the venue determination, thus, differs greatly from the scope of the decision made by the trial court because the appellate court must rule solely on the basis of certain documents, without the benefit of live testimony and the entire record.[66] Thus,

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59. Runnells v. Firestone, 746 S.W.2d 845, 848 (Tex. App.—Houston [14th Dist.]), *writ denied per curiam*, 760 S.W.2d 240 (Tex. 1988).

60. Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 203 (Tex. 1985); Siskind v. Villa Found. for Educ., Inc., 642 S.W.2d 434, 438 (Tex. 1982).

61. Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 47 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e.*, 699 S.W.2d 199 (Tex. 1985).

62. Schlobohm v. Schapiro, 784 S.W.2d 355, 359 (Tex. 1990); Hotel Partners v. KPMG Peat Marwick, 847 S.W.2d 630, 632 (Tex. App.—Dallas 1993, no writ); Carbonit Houston, Inc. v. Exchange Bank, 628 S.W.2d 826, 829 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

63. *Schlobohm*, 784 S.W.2d at 359. *Contra Hotel Partners*, 847 S. W.2d at 632 (holding that standard of review is factual sufficiency, not de novo review); *Runnells*, 746 S.W.2d at 849 (indicating that when trial court overrules special appearance, parties should request trial court to make findings of fact, which are reviewable for factual and legal sufficiency).

64. TEX. R. CIV. P. 86, 87.

65. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986); Ruiz v. Conoco, Inc., 36 Tex. Sup. Ct. J. 412, 417-18 (Dec. 31, 1992). *See generally* TEX. R. CIV. P. 255-59 (allowing change of venue based on prejudicial venue).

66. TEX. R. CIV. P. 87(3)(a); Kansas City S. Ry. Co. v. Carter, 778 S.W.2d 911, 915 (Tex. App.—Texarkana 1989, writ denied); Texas City Refining, Inc. v. Conoco, Inc., 767 S.W.2d 183, 185 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

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the trial court might properly overrule a motion to transfer venue and later determine, based on additional evidence or evidence presented during trial, that venue lies in another county.[67] Appellate courts have criticized this review standard and have observed that review of venue decisions is the one situation when an appellate court may review a matter upon which the trial court had no opportunity to act.[68] Nevertheless, the appellate court reviews the trial court's determination by examining the entire record.[69] If venue was improper, the case must be reversed.[70] When venue was proper in both the county from which the case was transferred and the county to which the case was transferred, the appellate courts are split on the issue of whether the transfer constitutes harmless error or reversible error.[71]

D. *Default Judgment*

A default judgment is entered against a defendant who fails to make timely answer although she was properly served.[72] A postanswer default occurs when a defendant has answered, but has failed to make an appearance at trial.[73] Different rules apply to set aside a default judgment depending on whether the judgment was proper (it was secured in accordance with the statutes and rules) or was defective (it was not secured in accordance with the statutes and rules).

1. Proper Default Judgment

A three-part test for determining whether a court should grant a motion for new trial to set aside a proper default judgment was set forth in the leading case, *Craddock v. Sunshine Bus Lines, Inc.*[74] A

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67. *Texas City Refining, Inc.*, 767 S.W.2d at 185.

68. *Kansas City S. Ry. Co.*, 778 S.W.2d at 915; *Texas City Refining, Inc.*, 767 S.W.2d at 185.

69. *See Ruiz*, 36 Tex. Sup. Ct. J. at 417 (rejecting "preponderance of the evidence" review and noting confusion in interpreting, applying, and harmonizing Rule 87 and § 15.064(b)).

70. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986).

71. *Compare* Marantha Temple v. Enterprise Prods. Co., 833 S.W.2d 736, 740-41 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (holding error is reversible) *and* Cox Eng'g v. Funston Mach. & Supply Co., 749 S.W.2d 508, 511-12 (Tex. App.—Fort Worth 1988, no writ) (holding error is reversible) *with* Lewis v. Exxon Co., U.S.A., 786 S.W.2d 724, 728 (Tex. App.—El Paso 1989, writ denied) (holding error is harmless) *and* Lone Star Steel Co. v. Scott, 759 S.W.2d 144, 147 (Tex. App.—Texarkana 1988, writ denied) (holding error is harmless).

72. TEX. R. CIV. P. 239; *see* Michael A. Pohl & David Hittner, *Judgments by Default in Texas*, 37 SW. L.J. 421, 422 (1983) (discussing grounds for default judgment).

73. Stoner v. Thompson, 578 S.W.2d 679, 682 (Tex. 1979).

74. 134 Tex. 388, 392-93, 133 S.W.2d 124, 126 (1939); *see also* Holt Atherton Indus., Inc.

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trial court may set aside a default judgment and order a new trial in any case when the defendant's failure to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident.[75] The motion for new trial must set up a meritorious defense[76] and must be filed at a time when the granting of the motion will occasion no delay, or otherwise work an injury to the plaintiff.[77] The *Craddock* standards apply also to a post-answer default judgment.[78] If the facts underlying the default judgment are disputed, the trial court may, but is not required to, make findings in support of its ruling.[79] These findings will be reviewed under sufficiency of the evidence standards. In the absence of fact findings, the judgment must be upheld on any legal theory having sufficient support in the evidence.[80]

The trial court determines whether the defendant has satisfied the *Craddock* test, and the court's ruling will not be disturbed on appeal absent a showing of an abuse of that discretion.[81] "However, the trial courts should exercise liberality in favor of a defaulted party having a day in court in passing on a motion for new trial and the sufficiency of

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v. Heine, 835 S.W.2d 80, 82 (Tex. 1992); Bank One, N.A. v. Moody, 830 S.W.2d 81, 82-83 & n.2 (Tex. 1992) (reaffirming three-part test).

75. A slight excuse will suffice. Harmon Truck Lines, Inc. v. Steele, 836 S.W.2d 262, 265 (Tex. App.—Texarkana 1992, writ dism'd). If there is controverting evidence on this issue, the court must judge the credibility and weight of the witnesses' testimony. *See* Strackbein v. Prewitt, 671 S.W.2d 37, 39 (Tex. 1984) (analyzing evidence presented in motion for new trial). The conclusion that the failure to answer was intentional must be supported by evidence and be correct as a matter of law. *Id.*

76. A meritorious defense is one that if proved would cause a different result upon retrial of the case, although it does not have to be a totally opposite result. *See* Holliday v. Holliday, 72 Tex. 581, 585, 10 S.W. 690, 692 (1889) (stating that defense must be set forth to establish at least prima-facie case). The defendant must allege facts which in law would constitute a defense to the plaintiff's claim and are supported by evidence. Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966).

77. *Craddock*, 134 Tex. at 391, 133 S.W.2d at 126; *see* Angelo v. Champion Restaurant Equip. Co., 713 S.W.2d 96, 97 (Tex. 1986) (reaffirming *Craddock*).

78. *E.g.*, LeBlanc v. LeBlanc, 778 S.W.2d 865, 865 (Tex. 1989); Lopez v. Lopez, 757 S.W.2d 721, 722 (Tex. 1988); Cliff v. Huggins, 724 S.W.2d 778, 779 (Tex. 1987); Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986); Ivy v. Carrell, 407 S.W.2d 212, 214 (Tex. 1966).

79. *See* Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 940 (Tex. App.—Austin 1987, no writ) (explaining value of trial court record, fact findings, and conclusions); Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d 16, 19 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (recognizing that if facts are undisputed, trial court findings of fact are unauthorized).

80. *Strackbein*, 671 S.W.2d at 38; O'Connell v. O'Connell, 843 S.W.2d 212, 217 (Tex. App.—Texarkana 1992, no writ); Cope v. United States Fidelity & Guar. Co., 752 S.W.2d 608, 609 (Tex. App.—El Paso 1988, no writ).

81. *Cliff*, 724 S.W.2d at 778; *Grissom*, 704 S.W.2d at 326; *Strackbein*, 671 S.W.2d at 38.

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the supporting evidence."[82] Further, when the court determines that the guidelines of *Craddock* have been met, it is an abuse of discretion to deny a new trial.[83]

2. Defective Default Judgment

If the default judgment is not rendered in compliance with the statutes and rules and the defect is apparent on the face of the record, the judgment may be set aside by: a motion to set aside, a motion for new trial, an appeal, or a writ of error to the court of appeals. In reviewing a default judgment under any of these remedies, both trial and reviewing courts may only consider errors that appear on the face of the record.[84] A motion for new trial following a defective default judgment does not have to meet the *Craddock* requirements, and should not be confused with a motion for new trial after a proper default judgment.[85] It is imperative that the record affirmatively show strict compliance with the provided mode of service.[86] "This showing must be made from the record as it existed before the trial court when the default judgment was signed, unless the record is amended pursuant to Texas Rule of Civil Procedure 118."[87]

A defendant against whom a defective default judgment has been

82. Sexton v. Sexton, 737 S.W.2d 131, 133 (Tex. App.—San Antonio 1987, no writ).

83. J.H. Walker Trucking v. Allen Lund Co., 832 S.W.2d 454, 456 (Tex. App.—Houston [1st Dist.] 1992, no writ); Blake v. Blake, 725 S.W.2d 797, 800 (Tex. App.—Houston [1st Dist.] 1987, no writ); O'Hara v. Hexter, 550 S.W.2d 379, 383 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.). If the facts underlying the default judgment are disputed, the trial court may make findings in support of its ruling, which will be reviewed under the same factual and legal standards as those for findings of fact after a trial on the merits. *Dallas Heating Co., Inc.*, 561 S.W.2d at 19; *see also Landon*, 724 S.W.2d at 940. In the absence of fact findings, the judgment must be upheld on any legal theory that finds support in the evidence. *Strackbein*, 671 S.W.2d at 38; *see also Cope*, 752 S.W.2d at 609.

84. Stubbs v. Stubbs, 685 S.W.2d 643, 644-45 (Tex. 1985); *see also* United Nat'l Bank v. Travel Music, 737 S.W.2d 30, 33 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); First Dallas Petroleum, Inc. v. Hawkins, 727 S.W.2d 640, 642-44 (Tex. App.—Dallas 1987, no writ). *See generally* Part XIV, *infra*.

85. Dan Edge Motors, Inc. v. Scott, 657 S.W.2d 822, 824 (Tex. App.—Texarkana 1983, no writ).

86. Uvalde Country Club v. Martin Linen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985); McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965).

87. Cox Marketing, Inc. v. Adams, 688 S.W.2d 215, 217-18 (Tex. App.—El Paso 1985); *see* Higginbotham v. General Life & Accident Ins. Co., 796 S.W.2d 695, 698 (Tex. 1990) (Phillips, C.J., dissenting, joined by Cook, Hightower & Hecht, JJ.) (quoting *Cox Marketing*, 688 S.W.2d at 217-18); *see also* TEX. R. CIV. P. 118 (allowing amendment to record regarding proof of service).

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taken may urge the error for the first time on appeal, unless the nature of the error requires that evidence be presented and a finding of fact be made by the trial court.[88] Absent this need for evidence, the default judgment is reviewed to determine whether it was rendered in compliance with the statutes and rules on appeal.

E. *Plea in Abatement*

"A plea in abatement is a plea setting forth some obstacle to further prosecution of the cause until it is removed, and if the plea is sustained the action is abated until the impediment is removed."[89] Abuse of discretion is the standard of review in determining a trial court's action granting or denying a plea in abatement.[90] The propriety of sustaining or overruling a plea in abatement depends upon the evidence adduced at the hearing on the plea, and, on appeal, the party challenging the trial court's action must file a statement of facts from the hearing.[91] If the trial court sustains the plea without hearing evidence, the appellate court "must accept allegations of fact in the petition as true and indulge every reasonable inference" in support of the allegations.[92]

F. *Special Exceptions*

"A petition is sufficient if it gives fair and adequate notice of the facts on which the pleader bases his claim."[93] If no special exceptions are filed, the court will construe the pleadings liberally in favor of the pleader.[94] If a pleading fails to give fair notice,[95] the defendant should

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88. TEX. R. CIV. P. 324(b)(1); *see also* Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 29 (Tex. App.—Texarkana 1988, no writ).

89. Mercure Co. v. Rowland, 715 S.W.2d 677, 680 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *see* Hartley v. Coker, 843 S.W.2d 743, 746-48 (Tex. App.—Corpus Christi 1992, no writ) (discussing mandatory abatement, its exceptions, and discretionary abatement).

90. Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 248 (Tex. 1988); Arbor v. Black, 695 S.W.2d 564, 567 (Tex. 1985); Dolenz v. Continental Nat'l Bank, 620 S.W.2d 572, 575 (Tex. 1981); Project Eng'g USA Corp. v. Gator Hawk, Inc., 833 S.W.2d 716, 724 (Tex. App.—Houston [1st Dist.] 1992, no writ); Space Master Int'l, Inc. v. Porta-Kamp Mfg. Co., 794 S.W.2d 944, 946 (Tex. App.—Houston [1st Dist.] 1990, no writ).

91. Vestal v. Jackson, 598 S.W.2d 724, 725 (Tex. Civ. App.—Waco 1980, no writ).

92. Jenkins v. State, 570 S.W.2d 175, 177 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

93. City of Houston v. Howard, 786 S.W.2d 391, 393 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (citing TEX. R. CIV. P. 45).

94. Texas Health Enters., Inc. v. Krell, 828 S.W.2d 192, 206 (Tex. App.—Corpus Christi), *vacated by agr.*, 830 S.W.2d 922 (Tex. 1992); *see* Paramount Pipe & Supply Co. v.

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specially except to the petition pursuant to Rule 91.[96] Special exceptions must "point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations,"[97] or otherwise require the adverse party to clarify his pleadings "when they [the pleadings] are not clear or sufficiently specific."[98] In fact, the trial court has wide latitude "in hearing, construing, and sustaining special exceptions."[99] If a trial court sustains one party's special exceptions, the opposing party must be given an opportunity to amend its pleading before the case is dismissed.[100] If the defect in the pleading is not cured after amendment, the trial court may dismiss the case.[101] In reviewing the trial court's order of dismissal upon special exceptions, the appellate court is required to accept "as true all material factual propositions alleged and all factual statements reasonably inferred from the allegations" set forth in the pleading.[102] The trial court's ruling is reviewed for an abuse of discretion.[103]

If, however, the pleading deficiency cannot be cured by an amendment, a special exception is unnecessary and a summary judgment based on the pleadings is appropriate.[104] The distinction is that "in-

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Muhr, 749 S.W.2d 491, 496 (Tex. 1988) (holding that petition gave fair notice of attorney's fees demand, although would have been properly attacked by special exception).

95. "The test of fair notice is whether an opposing attorney of reasonable competence, with the pleadings before him, can determine the nature of the controversy and the testimony probably relevant." *Howard*, 786 S.W.2d at 393.

96. TEX. R. CIV. P. 91.

97. *Id.*

98. Villareal v. Martinez, 834 S.W.2d 450, 451 (Tex. App.—Corpus Christi 1992, no writ).

99. City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 783 (Tex. App.—Dallas 1992, writ denied) (citing Bader v. Cox, 701 S.W.2d 677, 686 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)).

100. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983) (quoting Texas Dep't of Corrections v. Herring, 513 S.W.2d 6, 10 (Tex. 1974)); Parras v. McLelland, 846 S.W.2d 44, 45 (Tex. App.—Corpus Christi 1992, writ denied).

101. *Massey*, 652 S.W.2d at 934; Russell v. Texas Dep't of Human Resources, 746 S.W.2d 510, 512-13 (Tex. App.—Texarkana 1988, writ denied).

102. *Houston Lighting & Power Co.*, 844 S.W.2d at 783; *Villareal*, 834 S.W.2d at 452; Fidelity & Casualty Co. v. Shubert, 646 S.W.2d 270, 277-78 (Tex. Civ. App.—Tyler 1983, writ ref'd n.r.e.); Armendariz v. Bill Sears Supermarket No. 1, 562 S.W.2d 529, 530 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

103. *Houston Lighting & Power Co.*, 844 S.W.2d at 783 (citing *Bader*, 701 S.W.2d at 686).

104. Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1979); *e.g.*, James v. Hitchcock Indep. Sch. Dist., 742 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1987, writ denied); Gay v. State, 730 S.W.2d 154, 158-59 (Tex. App.—Amarillo 1987, no

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adequately pleading a cause of action" warrants a special exception, while "utterly failing to plead a viable cause of action" warrants a summary judgment.[105] Nevertheless, the cautious practitioner should specially except to the pleading deficiency. If the plaintiff fails to correct the deficiency after being given an opportunity to replead, then the defendant should move for summary judgment.[106]

G. *Temporary and Permanent Injunctions*

At a hearing upon the request for a temporary injunction, the only question before the trial court is "whether the applicant is entitled to the preservation of the status quo of the subject matter of the suit pending trial on the merits."[107] To be entitled to a temporary injunction, the movant must show: (1) a probable right to recovery; (2) that imminent, irreparable harm will occur in the interim if the request is not granted; and (3) that no adequate remedy at law exists.[108]

Every order granting a temporary injunction must "include an order setting the cause for a trial on the merits with respect to the ultimate relief sought."[109] Failure to include an order setting the matter for a trial on the merits mandates dissolution of the injunction.[110] Furthermore, "the trial court's stated reasons for granting or denying a temporary injunction must be specific and legally sufficient and not merely conclusory."[111] The trial court is not required to explain its

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writ); Jacobs v. Cude, 641 S.W.2d 258, 261 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

105. Chambers v. Huggins, 709 S.W.2d 219, 224 (Tex. App.—Houston [14th Dist.] 1985, no writ).

106. *See* Baubles & Beads v. Louis Vuitton, S.A., 766 S.W.2d 377, 379 (Tex. App.—Texarkana 1989, no writ) (explaining that summary judgment may be based on plaintiff's failure to plead cause of action after given opportunity to replead).

107. Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978); *e.g.*, University of Tex. Med. School at Houston v. Than, 834 S.W.2d 425, 428 (Tex. App.—Houston [1st Dist.] 1992, no writ); Alamo Sav. Ass'n v. Forward Constr. Corp., 746 S.W.2d 897, 899 (Tex. App.—Corpus Christi 1988, writ dism'd w.o.j.).

108. Sun Oil Co. v. Whitaker, 424 S.W.2d 216, 218 (Tex. 1968); Inex Indus., Inc. v. Alpar Resources, Inc., 717 S.W.2d 685, 687-88 (Tex. App.—Amarillo 1986, no writ); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 65.011 (Vernon 1986 & Supp. 1993) (listing general grounds for injunctive relief); Bob E. Shannon et al., *Temporary Restraining Orders and Temporary Injunctions in Texas—A Ten Year Survey, 1975-1985*, 17 ST. MARY'S L.J. 689, 700-21 (1986) (setting forth factors courts considered in determining whether to issue injunctive relief).

109. TEX. R. CIV. P. 683.

110. InterFirst Bank San Felipe v. Paz Constr. Co., 715 S.W.2d 640, 641 (Tex. 1986).

111. Arrechea v. Plantowsky, 705 S.W.2d 186, 189 (Tex. App.—Houston [14th Dist.]

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reasons for concluding that the applicant has shown a probable right to final relief, but the court is required to give the reasons why it believes injury will result if the interlocutory relief is not ordered.[112] Failure to meet these requirements renders the order "fatally defective and void, thereby requiring reversal, even if the issue is not raised specifically by [a] point of error."[113]

Because an appeal of an order granting or denying a temporary injunction, or granting or overruling a motion to dissolve a temporary injunction, is an appeal from an interlocutory order,[114] the merits of the movant's case are not considered upon appeal.[115] Appellate review is, therefore, strictly limited to whether the trial court has clearly abused discretion.[116] The appellate court should not substitute its judgment for that of the trial court, but rather it should merely determine whether the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion.[117] The trial court abuses its discretion when the court misapplies the law to "the established facts or when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery."[118] Additionally,

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1985, no writ); Martin v. Linen Sys. for Hosps. Inc., 671 S.W.2d 706, 710 (Tex. App.—Houston [1st Dist.] 1984, no writ); University Interscholastic League v. Torres, 616 S.W.2d 355, 357-58 (Tex. Civ. App.—San Antonio 1981, no writ).

112. TEX. R. CIV. P. 683; State v. Cook United, Inc., 464 S.W.2d 105, 106 (Tex. 1971); Transport Co. v. Robertson Transp. Inc., 152 Tex. 551, 556, 261 S.W.2d 549, 552 (1953); *e.g., Than*, 834 S.W.2d at 428; Hellenic Inv., Inc. v. Kroger Co., 766 S.W.2d 861, 863-64 (Tex. App.—Houston [1st Dist.] 1989, no writ); Public Util. Comm'n v. City of Austin, 710 S.W.2d 658, 660 (Tex. App.—Austin 1986, no writ); Beckham v. Beckham, 672 S.W.2d 41, 43 (Tex. App.—Houston [14th Dist.] 1984, no writ).

113. *Arrechea*, 705 S.W.2d at 189; *Torres*, 616 S.W.2d at 358.

114. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1993) (defining when person may appeal from interlocutory order).

115. Davis v. Huey, 571 S.W.2d 859, 861 (Tex. 1978); Sherrod v. Moore, 819 S.W.2d 201, 202 (Tex. App.—Amarillo 1991, no writ).

116. *Davis*, 571 S.W.2d at 861-62; State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 528 (Tex. 1975); Janus Films, Inc. v. City of Fort Worth, 163 Tex. 616, 358 S.W.2d 589, 590 (1962); *Transport Co.*, 152 Tex. at 556, 261 S.W.2d at 552; Uniden Am. Corp. v. Trunking Assoc., 841 S.W.2d 522, 523 (Tex. App.—Fort Worth 1992, no writ).

117. *Davis*, 571 S.W.2d at 862; *Sherrod*, 819 S.W.2d at 202; Philipp Bros., Inc. v. Oil Country Specialists, Ltd., 709 S.W.2d 262, 265 (Tex. App.—Houston [1st Dist.] 1986, writ dism'd).

118. *Southwestern Bell Tel. Co.*, 526 S.W.2d at 528; *Uniden Am. Corp.*, 841 S.W.2d at 523; *Than*, 834 S.W.2d at 429; City of San Antonio v. Bee-Jay Enter., Inc., 626 S.W.2d 802, 804 (Tex. App.—San Antonio 1981, no writ). The court should also consider public interest as a factor when reviewing a temporary injunction. Owens-Corning Fiberglass Corp. v. Baker, 838 S.W.2d 838, 842 (Tex. App.—Texarkana 1992, no writ).

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"where the facts conclusively show a party is violating the substantive law, it becomes the duty of the court to enjoin the violation and there is, therefore, no discretion to be exercised.[119] In reviewing an order granting or denying a temporary injunction, the appellate court should draw all legitimate inferences from the evidence in a manner most favorable to the trial court's judgment.[120]

In an appeal from a permanent injunction, the standard of review is clear abuse of discretion.[121] While "a litigant has a right to a trial by jury in an equitable injunction action, only ultimate issues of fact are submitted for jury determination."[122] A jury will not "determine the expediency, necessity or propriety of equitable relief."[123] Thus, the trial court's order granting or denying a permanent injunction, based upon the ultimate facts, is reviewed in the same manner as a temporary injunction is reviewed.[124]

H. *Severance and Consolidation of Causes*

Pursuant to Texas Rules of Civil Procedure 41 and 174,[125] the trial court may sever or consolidate causes. A trial court will consider essentially the same factors in determining either severance or consolidation.[126] A claim is properly severable if "(1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues."[127] The

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119. Priest & Van Comm'n, Inc. v. Texas Animal Health Comm'n, 780 S.W.2d 874, 876 (Tex. App.—Dallas 1989, no writ); City of Houston v. Memorial Bend Util. Co., 331 S.W.2d 418, 422 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

120. Miller v. K & M Partnership, 770 S.W.2d 84, 87 (Tex. App.—Houston [1st Dist.] 1989, no writ).

121. University Interscholastic League v. Buchanan, 848 S.W.2d 298, 301 (Tex. App.—Austin, 1993, n.w.h.); *Priest & Van Comm'n, Inc.*, 780 S.W.2d at 875.

122. *Id.* at 876 (citing State v. Texas Pet Foods, Inc., 591 S.W.2d 800, 803 (Tex. 1979)).

123. *Id.*

124. *Id.*

125. TEX. R. CIV. P. 41 (governing misjoinder and nonjoinder of parties); TEX. R. CIV. P. 174 (authorizing consolidation and separation of trials).

126. Dal-Briar Corp. v. Baskette, 833 S.W.2d 612, 615 (Tex. App.—El Paso 1992, orig. proceeding).

127. Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990) (citing Saxer v. Nash Phillips-Copus Co. Real Estate, 678 S.W.2d 736, 739 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)); *e.g.*, State Dep't of Highways & Publ. Transp. v. Cotner, 845 S.W.2d 818, 819 (Tex. 1993) (per curiam); Coalition of Cities for Affordable Util. Rates v.

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primary justifications for granting a severance are to "do justice, avoid prejudice, and further convenience."[128] Rule 41 gives the trial court broad discretion in the matter of severance, and the trial court's decision to grant a severance will not be reversed absent an abuse of that discretion.[129] A trial court may not, however, sever a case after it has been submitted to the trier of fact.[130]

Similarly, the trial court has broad discretion to consolidate cases pursuant to Rule 174.[131] The express purpose of Rule 174 is to further convenience, avoid prejudice, and promote the ends of justice.[132] The trial court's rulings on consolidation are within the discretion of the trial court and will not be reversed absent an abuse of discretion that is prejudicial to the complaining party.[133]

I. *Intervention*

Texas Rule of Civil Procedure 60[134] allows a party to intervene in an existing cause of action, "subject to being stricken by the court for sufficient cause on the motion of any party."[135] A party, however, may not intervene during the time period after a judgment has been

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Public Util. Comm'n of Tex., 798 S.W.2d 560, 564 (Tex. 1990); McGuire v. Commercial Union Ins. Co. of N.Y., 431 S.W.2d 347, 351 (Tex. 1968); Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 611-12, 350 S.W.2d 11, 19 (1961).

128. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658 (citing St. Paul Ins. Co. v. McPeak, 641 S.W.2d 284, 289 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.)); State Farm Mut. Auto Ins. Co. v. Wilborn, 835 S.W.2d 260, 261 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

129. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 658; Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982); *McGuire*, 431 S.W.2d at 351; Tracy v. Annie's Attic, Inc., 840 S.W.2d 527, 540 (Tex. App.—Tyler 1992, writ denied); *see Wilborn*, 835 S.W.2d at 261 (stating that "trial court has wide discretion to order or not order separate trials when judicial convenience is served and prejudice avoided").

130. *Cotner*, 845 S.W.2d at 819 (quoting *Coalition of Cities for Affordable Util. Rates*, 793 S.W.2d at 564).

131. *Cherokee Water Co.*, 641 S.W.2d at 525 (Tex. 1982); Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 721 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

132. Womack v. Berry, 156 Tex. 44, 51, 291 S.W.2d 677, 683 (1956); *Dal Briar Corp.*, 833 S.W.2d at 615.

133. *Cherokee Water Co.*, 641 S.W.2d at 525; Allison v. Arkansas La. Gas Co., 624 S.W.2d 566, 528 (Tex. 1981); *Womack*, 156 Tex. at 51, 291 S.W.2d at 683; Lone Star Ford, Inc. v. McCormick, 838 S.W.2d 734, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied); General Life & Accident Ins. Co. v. Handy, 766 S.W.2d 370, 375 (Tex. App.—El Paso 1989, no writ); Marshall v. Harris, 764 S.W.2d 34, 35 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding); *Adams*, 745 S.W.2d at 721.

134. TEX. R. CIV. P. 60.

135. *Id.*

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signed and the trial court's jurisdiction has expired.[136] "[U]nder Rule 60, a person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or if the action had been brought against him, he would be able to defeat recovery, or some part thereof."[137] The asserted interest may be legal or equitable.[138] An intervenor does not have the burden of seeking permission to intervene; rather, "the party opposing the intervention has the burden to challenge it by a motion to strike."[139] In response to the motion, the trial court may: "(a) try the intervention claim; (b) sever the intervention; (c) order a separate trial on the intervention issues; or (d) strike the intervention for good cause."[140] The party opposing the intervention must file a motion to strike, and while the trial court has broad discretion in ruling on the motion, the trial court abuses its discretion if "(1) the intervenor meets the above test, (2) the intervention will not complicate the case by excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor's interest."[141] Finally, the trial court abuses its discretion if it strikes a plea in intervention absent a motion to strike.[142]

J. *Interpleader*

Texas Rule of Civil Procedure 43, providing for interpleader actions, extends and liberalizes the equitable remedy of bill of inter-

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136. Comal County Rural High Sch. Dist. v. Nelson, 158 Tex. 564, 565-66, 314 S.W.2d 956, 957 (1958); *see* Highlands Ins. Co. v. Lumberman's Mut. Cas. Co., 794 S.W.2d 600, 602-04 (Tex. App.—Austin 1990, no writ) (discussing decisions that denied postjudgment pleas of intervention).

137. Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990) (citing Inter-Continental Corp. v. Moody, 411 S.W.2d 578, 589 (Tex. Civ. App.—Houston [1st Dist.] 1966, writ ref'd n.r.e.)); Texas Supply Center, Inc. v. Daon Corp., 641 S.W.2d 335, 337 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)).

138. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657 (citing *Moody*, 411 S.W.2d at 589); Mendez v. Bower, 626 S.W.2d 498, 499 (Tex. 1982).

139. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657; *e.g.*, *Mendez*, 626 S.W.2d at 499.

140. Saldana v. Saldana, 791 S.W.2d 316, 320 (Tex. App.—Corpus Christi 1990, no writ).

141. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657 (citing *Moody*, 411 S.W.2d at 589; *Daon Corp.*, 641 S.W.2d at 337)); H. Tebbs, Inc. v. Silver Eagle Distrib., 797 S.W.2d 80, 84 (Tex. App.—Austin 1990, no writ); *see* Metromedia Long Distance, Inc. v. Hughes, 810 S.W.2d 494, 498 (Tex. App.—San Antonio 1991, writ denied) (noting that interventions favored to avoid multiplicity of lawsuits).

142. Tony's Tortilla Factory, Inc. v. First Bank, No. 01-91-00226-CV, 1993 WL 81228 at *8 (Tex. App.—Houston [1st Dist.] Mar. 25, 1993, n.w.h.) (citing *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657 (Tex. 1990)).

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pleader.[143] Rule 43 permits a disinterested and innocent stakeholder, who has reasonable doubts about the identity of the party entitled to the funds or property in his possession, to file in good faith an interpleader action against the claimants.[144] A stakeholder is not required to be wholly disinterested in the suit,[145] he need only show that he may be exposed to double or multiple liability caused by conflicting claims, thereby justifying a reasonable doubt, either of law or fact, as to which claimant is entitled to funds or property.[146] Rule 43 requires a party filing an interpleader action to establish (1) that he is either subject to or has reasonable grounds to anticipate rival claims to the same fund or property,[147] (2) that he has not unreasonably delayed filing his action for interpleader;[148] and (3) that he has unconditionally tendered the fund or property to the court.[149] Every reasonable doubt is resolved in favor of allowing the interpleader.[150] The granting of interpleader, a final judgment,[151] is within the discretion of the trial court.[152]

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143. Downing v. Laws, 419 S.W.2d 217, 220 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.); Barnett v. Woodland, 310 S.W.2d 644, 747 (Tex. Civ. App.—Austin 1958, writ ref'd n.r.e.); *see* Savings & Profit Sharing Fund of Sears Employees v. Stubbs, 734 S.W.2d 76, 79-80 (Tex. App.—Austin 1987, no writ) (discussing early and current interpleader practice); 1 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 564, at 577-83 (rev. 1992) (discussing early and current interpleader practice).

144. United States v. Ray Thomas Gravel Co., 380 S.W.2d 576, 580 (Tex. 1964).

145. *Downing*, 419 S.W.2d at 219-20.

146. Davis v. East Texas Sav. & Loan Ass'n, 163 Tex. 361, 365-66, 354 S.W.2d 926, 930 (1962); K & S Interests, Inc. v. Texas Am. Bank/Dallas, 749 S.W.2d 887, 889 (Tex. App.—Dallas 1988, writ denied); *Stubbs*, 734 S.W.2d at 79.

147. Great Am. Reserve Ins. Co. v. Sanders, 525 S.W.2d 956, 958 (Tex. 1975); *Ray Thomas Gravel Co.*, 380 S.W.2d at 580; *Davis*, 163 Tex. at 365-66, 354 S.W.2d at 930; *Stubbs*, 734 S.W.2d at 70.

148. *Stubbs*, 734 S.W.2d at 79.

149. *Id.*; Cockrum v. Cal-Zona Corp., 373 S.W.2d 572, 574-75 (Tex. Civ. App.—Dallas 1963, no writ).

150. Nixon v. Malone, 100 Tex. 250, 262-63, 98 S.W. 380, 385 (1906); *Stubbs*, 734 S.W.2d at 79; Dallas Bank & Trust Co. v. Commonwealth Dev. Corp., 686 S.W.2d 226, 230 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

151. *K & S Interests*, 749 S.W.2d at 889; Taliaferro v. Texas Commerce Bank, 660 S.W.2d 151, 152 (Tex. App.—Fort Worth 1983, no writ).

152. Danner v. Aetna Life Ins. Co., 496 S.W.2d 950, 953 (Tex. Civ. App.—Fort Worth 1973, no writ); Reid v. Uhlhorn, 359 S.W.2d 278, 281 (Tex. Civ. App.—San Antonio 1962, writ dism'd w.o.j.).

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K. *Discovery Rulings*

1. Requests for Admissions

After a lawsuit is commenced, a party may "serve on any other party a written request" for admissions pursuant to Rule 169.[153] If the party to whom the request is directed does not respond within thirty days after service of the request (fifty days if served with the citation and petition), the subjects of the request "are automatically deemed admitted and the trial court has no discretion to deem, or refuse to deem, the admissions admitted."[154] The admitted matter "is conclusively established as to the party making the admission, unless the court on motion permits withdrawal or amendment of the admission."[155]

When admissions are deemed against a party, the party should file a motion to withdraw or amend the admissions as soon as possible.[156] Rule 169(2) permits the trial court to allow a party to withdraw or amend admissions "upon a showing of good cause for such withdrawal or amendment if the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby."[157] The motion should, therefore, allege that: (1) there is good cause for not having responded to the request on time; (2) allowing withdrawal of the admissions will not "unduly" prejudice the party relying on the deemed admissions; and (3) the case can be presented on the merits following the withdrawal of the admission. "The 'good cause' requirement is a threshold issue, which must be determined before the trial judge can even consider the remaining requirements set forth in the rule."[158] The moving party should also attach affidavits setting out detailed facts supporting the elements of

153. TEX. R. CIV. P. 169(1).

154. Fibreboard Corp. v. Pool, 813 S.W.2d 658, 682 (Tex. App.—Texarkana 1991, no writ).

155. TEX. R. CIV. P. 169(2); *see* Smith v. Home Indem. Co., 683 S.W.2d 559, 562 (Tex. App.—Fort Worth 1985, no writ) (stating that admissions may not be contradicted by evidence once they are deemed).

156. *See* Employers Ins. of Wausau v. Halton, 792 S.W.2d 462, 464 (Tex. App.—Dallas 1990, writ denied) (finding counsel's speedy action in moving to withdraw admissions factor in good cause determination).

157. TEX. R. CIV. P. 169(2).

158. Boone v. Texas Employers' Ins. Ass'n, 790 S.W.2d 683, 688 (Tex. App.—Tyler 1990, no writ).

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the rule, and attach the answers it would have filed.[159]

A trial court has wide latitude to permit "the withdrawal or amendment of admissions, and its ruling will only be set aside on appeal on a showing of clear abuse of discretion."[160] The reviewing court should consider that the objective of the rules of procedure is "to obtain a just, fair, equitable and impartial adjudication of the rights of the litigants,"[161] and that "the purpose of Rule 169 is to simplify trials and eliminate matters about which there is no real controversy."[162] The court should also consider that the rules "should not be construed in such a manner that they will prevent a litigant from presenting the truth to the trier of facts."[163]

In *Employers Insurance of Wausau v. Halton*,[164] the court observed the similarity between a motion to set aside a default judgment, occasioned by a failure to file a timely answer, and a motion to set aside admissions of fact, occasioned by a party's failure to file timely proper responses.[165] Thus, a party may establish "good cause" by showing that she did not act intentionally or with conscious disregard in failing to file timely answers to the requests.[166] Under this lenient standard, "even a slight excuse will suffice, especially where delay or prejudice will not result against the opposing party."[167]

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159. The party seeking to withdraw admissions should request a hearing on its motion. It should notify the court reporter that a record of the hearing will be required. At the hearing, the moving party must present evidence, and witnesses that are necessary to convince the trial court to permit withdrawal of the deemed admissions. *See* Laycox v. Jaroma, Inc., 709 S.W.2d 2, 3 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (presenting scenario where failure to file timely answers resulted in summary judgment). Following the presentation of evidence, the party should obtain a ruling on its motion. *See id.* (explaining that failure to obtain ruling precluded further complaint of trial court action).

160. Bell v. Hair, 832 S.W.2d 55, 56 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *e.g.*, Rosenthal v. National Terrazzo Tile & Marble, Inc., 742 S.W.2d 55, 57 (Tex. App.—Houston [14th Dist.] 1987, no writ). Mandamus relief is not available to review a trial court's actions on deemed admissions. Sutherland v. Moore, 716 S.W.2d 119, 120-21 (Tex. App.—El Paso 1986, orig. proceeding).

161. North River Ins. Co. v. Greene, 824 S.W.2d 697, 700 (Tex. App.—El Paso 1992, writ denied) (citing TEX. R. CIV. P. 1).

162. *Id.* (citing Sanders v. Harder, 148 Tex. 593, 597, 227 S.W.2d 206, 208 (1950)).

163. *Id.* (citing Bynum v. Shatto, 514 S.W.2d 808, 811 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.)).

164. 792 S.W.2d 462 (Tex. App.—Dallas 1990, writ denied).

165. *Id.* at 465-66.

166. *Id.*; *see* Fibreboard Corp. v. Pool, 813 S.W.2d 658, 683 (Tex. App.—Texarkana 1991, no writ) (noting that "[g]ood cause can be shown even though a party may have been negligent, if his negligence does not rise to the level of conscious indifference").

167. *Greene*, 824 S.W.2d at 700; Esparza v. Diaz, 802 S.W.2d 772, 776 (Tex. App.—

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Under Rule 215(4), an evasive or incomplete answer may be treated as a deemed admission.[168] The requesting party may challenge the sufficiency of the answers or objections, and if the court finds the answer insufficient under Rule 169, the court may order the matter admitted or an amended answer be served.[169] The trial court's order is reviewed for an abuse of discretion based upon the entire record.[170]

2. Supplementation of Discovery Responses

Pursuant to Texas Rule of Civil Procedure 166b(6),[171] a party whose responses to a discovery request were correct and complete when made is generally under no duty to supplement the response to include after-acquired information.[172] Under certain circumstances, however, a duty to supplement may exist. A duty to supplement may be ordered by the court or created by agreement of the parties.[173] Furthermore, a party must supplement if he or she obtains information, and on the basis of that information "knows that the response either was incorrect or incomplete when made,"[174] or discovers that "though correct and complete when made, [the response] is no longer true and complete and the circumstances are such that failure to amend the response is in substance misleading."[175] Finally, a duty to supplement arises when a party expects to call an expert witness and the expert's identity or the subject matter of the expert's testimony "has not been previously disclosed in response to an appropriate inquiry directly addressed to the matter."[176]

The party supplementing discovery must serve his supplemental discovery "not less than thirty days prior to the beginning of trial unless the court finds good cause" for allowing late supplementa-

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Houston [14th Dist.] 1990, no writ). While a clerical error may constitute good cause, being busy and overworked is not good cause. *Greene*, 824 S.W.2d at 700-01.

168. TEX. R. CIV. P. 215(4)(a).

169. TEX. R. CIV. P. 215(4)(b); *see* U.S. Fire Ins. Co. v. Maness, 775 S.W.2d 748, 749-50 (Tex. App.—Houston [1st Dist.] 1989, writ refused) (rendering insufficient answers as deemed admissions).

170. *Maness*, 775 S.W.2d at 751.

171. TEX. R. CIV. P. 166b(6).

172. *Id.*

173. TEX. R. CIV. P. 166b(6)(c).

174. TEX. R. CIV. P. 166b(6)(a)(1).

175. TEX. R. CIV. P. 166b(6)(a)(2); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989).

176. TEX. R. CIV. P. 166b(6)(b).

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tion.[177] Pursuant to Rule 215(5),[178] the sanction for failing to comply with the duty to supplement is exclusion of the evidence affected by the violation, unless the offending party demonstrates good cause for the failure to supplement.[179] "The salutary purpose of Rule 215(5) is to require complete responses to discovery so as to promote responsible assessment of settlement and to prevent trial by ambush."[180] The party offering the evidence has the burden of establishing good cause.[181] The trial court's determination on the issue of good cause will not be set aside unless there is an abuse of discretion.[182] If the party offering the evidence fails to establish good cause, and the trial court admits the evidence over the opposing party's objection, the objecting party must show that the trial court's error "was reasonably calculated to cause and probably did cause the rendition of an improper judgment."[183] The appellate court will determine if the error probably caused the rendition of an improper judgment in light of the record as a whole.[184]

a. Fact Witnesses

If a fact witness is not disclosed at least thirty days prior to the beginning of trial after a proper discovery request, the witness cannot be called to testify.[185] There are two exceptions to this harsh sanc-

177. TEX. R. CIV. P. 166b(6).

178. TEX. R. CIV. P. 215(5).

179. *Id.*

180. Aetna Casualty & Sur. Co. v. Specia, 36 Tex. Sup. Ct. J. 673, 674 (Mar. 24, 1993) (orig. proceeding) (quoting Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 914 (Tex. 1992)).

181. TEX. R. CIV. P. 215(5); *e.g.*, Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989). The automatic exclusion in Rule 215(5) no longer applies when the original trial date is continued and the date set is more than thirty days from the date of the original trial date. H.B. Zachary Co. v. Gonzalez, 36 Tex. Sup. Ct. J. 526, 527 (Feb. 3, 1993).

182. Morrow v. H.E.B., Inc., 714 S.W.2d 297, 298 (Tex. 1986).

183. TEX. R. APP. P. 81(b); McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989).

184. *McKinney*, 772 S.W.2d at 75; Pittman v. Baladez, 158 Tex. 372, 381, 312 S.W.2d 210, 216 (1958).

185. *See* Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911, 914 (Tex. 1992) (citing Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 670-72 (Tex. 1990) (per curiam)); Rainbow Baking Co. v. Stafford, 787 S.W.2d 41, 41-42 (Tex. 1990); *Gee*, 765 S.W.2d at 395-97; *McKinney*, 772 S.W.2d at 73-76; Clark v. Trailways, Inc., 774 S.W.2d 644, 644 (Tex.), *cert. denied*, 493 U.S. 1074 (1989); *Boothe*, 766 S.W.2d at 645-48; E.F. Hutton & Co. v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987); Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693-94 (Tex. 1987); *Morrow*, 714 S.W.2d at 297-98; Yeldell v. Holiday Hills Retirement & Nursing Ctr., Inc., 701 S.W.2d 243, 244-45 (Tex. 1985)) (noting that exclusory sanction has been problematic for courts).

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tion. Under the first exception, a party offering unidentified witness testimony may demonstrate good cause, on the record, so that the trial court will allow the testimony.[186] However, trying to define "good cause" is like trying to define "abuse of discretion." It is easier to define what is not "good cause."[187] The good cause concept does not require the proponent of the witness to show good cause for failing to designate the witness timely; rather, the proponent must show good cause for admitting the late-designated witness's testimony.[188]

Under the second exception, a party to the suit, although not disclosed as a person with knowledge of relevant facts in response to interrogatories propounded by the opposing party, may testify at trial. This exception applies when the identity of the party "is certain and when his or her knowledge of relevant facts has been communicated to all other parties, through pleadings by name and response[s] to

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186. *Gee*, 765 S.W.2d at 395-96.

187. *See Alvarado*, 830 S.W.2d at 914 (noting that defining good cause rule is very problematic). The Texas Supreme Court has stated that the importance of the witness to the case should not be considered as an element in determining good cause. *Clark*, 774 S.W.2d at 646. Lack of surprise does not constitute good cause. *Morrow*, 714 S.W.2d at 298. However, lack of surprise may be considered as a factor in determining good cause. *Gee*, 765 S.W.2d at 395 n.2. The importance of the testimony cannot be considered in determining whether good cause exists for failure to properly designate the witness. *Alvarado*, 830 S.W.2d at 915; *Clark*, 774 S.W.2d at 645-46. Likewise, a party's claim that a denial of the testimony will cause it "great harm" does not establish good cause. *Boothe*, 766 S.W.2d 788, 789 (Tex. 1989). In one case, the plaintiff attempted to introduce the testimony of an investigating officer who had not been located until ten days before trial. *Clark*, 774 S.W.2d at 647. The court indicated that if a witness has been difficult to locate, the party attempting to introduce the evidence must demonstrate: (1) when the use of the witness was anticipated; (2) when the witness was located; and (3) what good faith efforts were made to locate the witnesses. *Id.* Mere failure to locate the witness until the last minute, then, will not suffice absent sufficient efforts to locate the witness. *Id.*; *see also* K-Mart Corp. v. Grebe, 787 S.W.2d 122, 126 (Tex. App.—Corpus Christi 1990, writ denied) (finding plaintiff's search for witness insufficient). The fact that a party expected a case to settle, and, therefore, did not contact a witness until the day of trial, does not constitute good cause. *Rainbow Baking Co.*, 787 S.W.2d at 41. "The fact that a witness' identity is known to all parties is not in itself good cause for the failure to supplement discovery." *Sharp*, 784 S.W.2d at 671. The supreme court noted that a party is entitled to prepare for trial "assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory." *Id.* Accordingly, the court held that the fact that a witness has been fully deposed (even if only his deposition testimony will be offered at trial) is not enough to show good cause for admitting the witness' testimony when the witness was not identified in response to a proper discovery request. *Id.* Inadvertence of counsel does not satisfy the good cause exception. Remington Arms Co. v. Canales, 837 S.W.2d 624, 625 (Tex. 1992, orig. proceeding); *Sharp*, 784 S.W.2d at 672.

188. *Clark*, 774 S.W.2d at 645-46.

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other discovery at least thirty days in advance of trial."[189] Though an undisclosed witness is a party, such does not in and of itself constitute "good cause."[190]

b. Expert Witnesses

Under Rule 166b(2)(e), there are four types of experts: (i) the testifying expert (if an expert will testify at trial, her identity and reports are discoverable); (ii) the nontestifying expert, whose opinions or reports are reviewed by testifying experts (if a testifying expert reviews the opinions, impressions, or report of the nontestifying expert, the nontestifying expert's identity and reports are discoverable); (iii) the consultant not hired in anticipation of litigation (this consultant's identity and reports are discoverable, whether or not he testifies);[191] and (iv) the nontestifying consultant hired in anticipation of litigation (this consultant's identity and reports are not discoverable).[192] After a proper request, if an expert witness is not designated as required by procedural guidelines, the expert shall not be allowed to testify at trial, absent a showing of good cause.[193]

Rule 166b(6) provides that expert witnesses must be disclosed in response to a proper discovery request "as soon as is practical, but in no event less than thirty days prior to the beginning of trial except on leave of court."[194] The courts of appeals cases have considered the "as soon as practical" provision and have reached inconsistent results.

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189. Smith v. Southwest Feed Yards, 835 S.W.2d 83, 91 (Tex. 1992); *e.g.*, Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992); Rogers v. Stell, 835 S.W.2d 100, 101 (Tex. 1992) (per curiam); Despain v. Davis, 848 S.W.2d 312, 313-14 (Tex. App.—Amarillo 1993, no writ); Browne v. Las Pintas Ranch, Inc., 845 S.W.2d 370, 372-73 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Guerrero*, 846 S.W.2d at 356-57.

190. *Smith*, 835 S.W.2d at 89; *see Guerrero*, 846 S.W.2d at 356-57 (limiting good-cause exception of Rule 215(5) to facts in *Smith*).

191. *See Axelson, Inc.*, 798 S.W.2d at 554 (stating consulting-only experts who gain information solely through consultation fall within exemption).

192. TEX. R. CIV. P. 166b(2)(e).

193. *See* TEX. R. CIV. P. 166b(6)(b) (delineating designation of experts); TEX. R. CIV. P. 215(5) (providing sanction for failure to designate); *Sharp*, 784 S.W.2d at 671-72 (noting that finding of good cause for failure to supplement may allow admission of testimony); *Clark*, 774 S.W.2d at 646 (Tex. 1989) (requiring finding of good cause to excuse failure to respond to discovery request). In the absence of good cause, a party may not call another party's expert where the expert was not properly designated in response to discovery. *See* Bullock v. Aluminum Co. of Am., 843 S.W.2d 640, 642 (Tex. App.—Corpus Christi 1992, writ requested) (refusing to allow undesignated witness to be called).

194. TEX. R. CIV. P. 166b(6).

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In *Builder's Equipment Co. v. Onion*,[195] the defendants did not begin looking in earnest for experts until the case was specially set for trial. After a three-month search, they hired three experts. One was designated thirty-five days after being hired, the second was designated forty-six days after being hired, and the third was designated forty-eight days after being hired. Even though all were designated more than thirty days prior to trial, the court of appeals held that the trial court did not abuse its discretion in determining that the defendants had not used due diligence in searching for and identifying its expert witnesses.[196] The San Antonio Court of Appeals held that the trial court's ruling, which excluded the testimony of experts disclosed more than thirty days before trial but many months after they were known to the plaintiff, did not amount to an abuse of discretion.[197] The appellate court held that the trial court could refuse to allow such experts to testify if they were not disclosed "as soon as is practical."[198] In other words, the mere fact that an expert is designated more than thirty days before trial will not preclude the trial court from excluding the expert's testimony.

In *Williams v. Crier*,[199] the trial court struck the plaintiffs' designation of three expert witnesses[200] pursuant to *Builder's Equipment*. On writ of mandamus, the Dallas Court of Appeals held that the defendants—the parties seeking to exclude the expert's testimony—had the burden to produce evidence that the witnesses had not been designated "as soon as practical."[201] The court ruled that there was no evidence in the record to support the trial court's finding that the plaintiffs had not used due diligence in searching for new witnesses.[202] The *Williams* holding turns on the lack of evidence to support the trial court's finding.

In *Mother Frances Hospital v. Coats*,[203] the trial court struck eight expert witnesses who were designated thirty-two days before trial. The plaintiff, who sought to strike the experts, relied upon *Builder's*

195. 713 S.W.2d 786 (Tex. App.—San Antonio 1986, orig. proceeding).
196. *Id.* at 788.
197. *Id.*
198. *Id.*
199. 734 S.W.2d 190 (Tex. App.—Dallas 1987, orig. proceeding).
200. *Id.* at 192-93.
201. *Id.* at 193.
202. *Id.*
203. 796 S.W.2d 566 (Tex. App.—Tyler 1990, orig. proceeding).

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Equipment and argued that the defendants' designation was untimely and that the defendants failed to show good cause for the late designation. The Tyler Court of Appeals held that Rule 166b(6) only requires a party to show good cause for late designation of witnesses when the designation is made less than thirty days before trial.[204] The court held also that without a specific pretrial order, a party is not required to "seek out" her expert witness at any particular time during the pretrial process.[205] The court declined to follow *Builder's Equipment* and concluded that the rationale of the decision was incorrect. Accordingly, the trial court was instructed to set aside its order, except as to one of the defendant's witnesses. The defendants had relied on that witness one year earlier by using her affidavit in support of a motion for summary judgment.[206] As to that witness, the court held that the designation was not "as soon as practical" by any definition.[207] Despite this part of the holding, the Tyler court's decision cannot be reconciled with *Builder's Equipment* and *Williams*.

Finally, in *Tinsley v. Downey*,[208] the plaintiff amended his response to interrogatories to designate eight potential testifying experts four years after filing his case. On the day of the amendment, the case was set for trial, with a trial date nine months in the future. The defendant moved to strike the experts and the trial court granted the motion as to four reconstruction and train experts, but denied the motion as to the medical experts.

The Fourteenth Court of Appeals in Houston set aside the trial court's order.[209] Recognizing the disagreement among the courts of appeals regarding the amount of time that satisfies the "as soon as practical" requirement,[210] the court held that parties are not required to designate experts as soon as they are contacted, whether they are contacted for investigative purposes or to testify at trial.[211] The court concluded that based upon the nature of the lawsuit and the length of time between the designation of the experts and the trial date, striking

204. *Id.* at 570-71.
205. *Id.*
206. *Coats*, 796 S.W.2d at 571.
207. *Id.*
208. 822 S.W.2d 784 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).
209. *Id.* at 787.
210. *Id.* at 786.
211. *Id.* at 787.

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the four expert witnesses was an abuse of discretion.[212]

c. Rebuttal Witnesses

The fact that a witness will be used only as a rebuttal witness does not eliminate the obligation to disclose the witness pursuant to the duty to supplement discovery. The party offering the witness's testimony must demonstrate good cause for the late disclosure.[213] Good cause may be established when counsel could not anticipate needing the evidence.[214]

3. Mandamus Review of Discovery Rulings

In *Walker v. Packer*,[215] the supreme court attempted to establish tighter writ of mandamus parameters to limit future review of discovery rulings. The court identified approximately six categories of discovery rulings that are proper subjects of mandamus review: (1) when a trial court erroneously orders the discovery of privileged, confidential, or otherwise protected information that will "materially affect the rights of the aggrieved party;"[216] (2) when a trial court "compels the production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party;"[217] (3) when a trial court's order vitiates or severely compromises a party's ability to present a viable claim

212. *Tinsley*, 822 S.W.2d at 787.

213. *Alvarado*, 830 S.W.2d at 916-17; AMSAV Group, Inc. v. American Sav. & Loan Ass'n, 796 S.W.2d 482, 486-87 (Tex. App.—Houston [14th Dist.] 1990, writ denied); Ramos v. Champlin Petroleum Co., 750 S.W.2d 873, 876 (Tex. App.—Corpus Christi 1988, writ denied); Greenstein, Logan & Co. v. Burgess Mktg., Inc., 744 S.W.2d 170, 178-79 (Tex. App.—Waco 1987, writ denied).

214. *See* Gannett Outdoor Co. of Tex. v. Kubeczka, 710 S.W.2d 79, 84 (Tex. App.—Houston [14th Dist.] 1986, no writ) (holding admission of expert's testimony to be based on good cause when need for testimony as rebuttal witness could not have been anticipated prior to unexpected false testimony of opponent's witness).

215. 827 S.W.2d 833 (Tex. 1992, orig. proceeding).

216. *Id.* at 843 (citing West v. Solito, 563 S.W.2d 240 (Tex. 1978, orig. proceeding) (concerning attorney-client privilege) and Automatic Drilling Mach. v. Miller, 515 S.W.2d 256 (Tex. 1974, orig. proceeding) (dealing with trade secrets)).

217. *Id.* (citing Sears, Roebuck & Co. v. Ramirez, 824 S.W.2d 558 (Tex. 1992) (considering demand for tax returns); General Motors Corp. v. Lawrence, 651 S.W.2d 732 (Tex. 1983) (covering demand for information about all vehicles for all years)); *see* Texas Water Comm'n v. Dellana, 36 Tex. Sup. Ct. J. 680, 682 (Mar. 24, 1993) (orig. proceeding) (per curiam) (granting mandamus relief vacating order compelling production of "patently irrelevant" discovery).

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or defense, making trial a waste of judicial resources;[218] (4) when a trial court's denial of discovery goes "to the heart" of a party's case;[219] (5) when "a trial court disallows discovery and the missing discovery cannot be made part of the appellate record;"[220] and (6) when a trial court denies discovery and refuses to make the requested discovery part of the record.[221]

An appellate court will issue mandamus to set aside a discovery order when the trial court refuses to perform a ministerial act or duty, or commits a clear abuse of discretion,[222] *and* when there is no adequate remedy by appeal.[223] A trial court abuses its discretion when its order is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[224] As to the resolution of fact issues, the trial court's decision is binding and may only be set aside if the trial court could have reached only one decision.[225] As to the resolution of legal issues, the trial court has no discretion in determining what the law is or in applying the law to the facts.[226] Accordingly, a clear fail-

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218. *Walker*, 827 S.W.2d at 843 (citing TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991, orig. proceeding) (striking pleadings and rendering default judgment)).

219. *Id.*

220. *Id.*

221. *Id.* In *Chapa v. Garcia*, 848 S.W.2d 667 (Tex. 1993, orig. proceeding), Justice Hecht observed that *Walker* holds:

> An ordinary appeal is not adequate to correct trial court discovery errors in three instances: (1) when the appellate court will be unable to cure the error, as when privileged information is ordered produced; (2) when a party's ability to present a viable claim or defense is vitiated or severely compromised; or (3) when the trial court disallows discovery and the requested materials cannot be made a part of the appellate record.

Id. at 679 (Hecht, J., dissenting, joined by Phillips, C.J., and Gonzalez & Cornyn, JJ.) (citing *Walker*, 827 S.W.2d at 843).

222. McGough v. First Court of Appeals, 842 S.W.2d 637, 640 (Tex. 1992, orig. proceeding) (per curiam); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 (Tex. 1992, orig. proceeding); *Walker*, 827 S.W.2d at 840; Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985, orig. proceeding); Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984, orig. proceeding).

223. *McGough* 842 S.W.2d at 640; *Jack B. Anglin Co.*, 842 S.W.2d at 271; *Walker*, 827 S.W.2d at 840; *Johnson*, 700 S.W.2d at 917; *Jampole*, 673 S.W.2d at 573.

224. *Walker*, 827 S.W.2d at 839 (quoting *Johnson*, 700 S.W.2d at 917); *see McGough*, 842 S.W.2d at 640 (holding that clear abuse of discretion is arbitrary and capricious act made "without reference to guiding principles").

225. *Walker*, 827 S.W.2d at 839-40 (citing Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41-42 (Tex. 1989)); *Johnson*, 700 S.W.2d at 918. Simply because the reviewing court would have decided the case differently is not a basis to disturb the trial court's ruling unless it is arbitrary and unreasonable. *Id.* at 840.

226. *Id.*

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ure to analyze or apply the law correctly constitutes an abuse of discretion.[227]

A fundamental tenet of mandamus review requires that the party seeking relief establish that there is no adequate remedy at law.[228] Because mandamus is an extraordinary remedy, it is available "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies."[229] Remedy by appeal is not inadequate merely because it may cause more expense or delay than mandamus review.[230] Mandamus review is justified only "when parties stand to lose their substantial rights."[231]

The scope of review in a mandamus proceeding includes certified or sworn copies of the disputed order and other relevant exhibits,[232] as well as a statement of facts from the relevant hearing.[233] The failure to include the statement of facts may cause the appellate court to presume that the trial court's ruling is supported by the record not included on appeal.[234] In some instances, there is no need for a statement of facts because the trial court made its determination without a hearing. In that event, the relator should file an affidavit stating that the trial court's decision was made without a hearing.[235] Instead of a statement of facts, the relator may include a verified affidavit of all facts necessary to establish the right to mandamus relief;[236] but, a statement of facts from the hearing is preferable.[237]

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227. *Id.* (citing Joachim v. Chambers, 815 S.W.2d 234, 240 (Tex. 1991)); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989); Eanes Indep. Sch. Dist. v. Logue, 712 S.W.2d 741, 742 (Tex. 1986)).

228. *Id.* (citing Holloway v. Fifth Court of Appeals, 767 S.W.2d 680, 684 (Tex. 1989)).

229. *Walker*, 827 S.W.2d at 840 (citing *Holloway*, 767 S.W.2d at 684 and quoting James Sales, *Original Jurisdiction of the Supreme Court and the Courts of Civil Appeals of Texas, in* APPELLATE PROCEDURE IN TEXAS, § 1.4[1][b], at 47 (2d ed. 1979)).

230. *Id.* at 842.

231. *Id.* (quoting Iley v. Hughes, 158 Tex. 362, 368, 311 S.W.2d 648, 652 (1958)).

232. TEX. R. APP. P. 121(a)(4).

233. TEX. R. APP. P. 121(a)(2)(c), 121(a)(4).

234. *See* Englander Co. v. Kennedy, 428 S.W.2d 806, 806 (Tex. 1968) (upholding presumption in favor of trial court findings in light of incomplete record).

235. Barnes v. Whittington, 751 S.W.2d 493, 495 (Tex. 1988).

236. TEX. R. APP. P. 121; *see also Barnes*, 751 S.W.2d at 495.

237. If the court reporter cannot prepare the statement of facts as quickly as necessary, the relator should file the relevant exhibits and include a verified statement that the statement of facts has been requested and will be filed as soon as it is prepared. *See* TEX. R. APP. P. 121 (describing mandamus procedure).

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4. Appellate Review of Discovery Rulings

In an appeal from a discovery or evidentiary ruling, the appellant must preserve error by (1) presenting to the trial court a timely request, objection, or motion setting forth its specific basis and (2) obtaining a ruling on the request, objection, or motion.[238]

In discovery matters, the appellate record should contain the discovery request at issue, along with any relevant objections and motions. Before a party can raise an issue at the appellate court level, the party must have raised the argument at the trial court.[239] The record must also contain a statement of facts from any evidentiary hearing held on the discovery issue. Finally, the standard of review is whether the trial court's order, in light of the entire record, "was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment."[240]

L. *Discovery Sanctions*

The purpose of discovery is "to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial."[241] Texas Rule of Civil Procedure 215(3), which authorizes trial courts to impose appropriate sanctions upon persons who abuse the discovery process, provides that orders imposing such sanctions "shall be subject to review on appeal from the final judgment."[242] There is no provision for interlocutory appeal; "[d]iscovery sanctions are not appealable until

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238. TEX. R. APP. P. 52(a).

239. H. E. Butt Grocery Co. v. Williams, 751 S.W.2d 554, 556 (Tex. App.—San Antonio 1988, orig. proceeding) (stating that failure to raise waiver at trial court level precludes raising argument in appellate courts); Garcia v. Allen, 751 S.W.2d 236, 237 (Tex. App.—San Antonio 1988, writ denied) (declaring that complaint that interrogatories were too broad cannot be raised for first time on appeal).

240. TEX. R. APP. P. 81(b)(1); *see* Soefje v. Stewart, 847 S.W.2d 311, 314-15 (Tex. App.—San Antonio 1992, writ denied) (analyzing discovery sanction of exclusion of witness testimony to determine whether error was reasonably calculated to cause and probably did cause rendition of improper judgment); Bruner v. Exxon Co., U.S.A., 752 S.W.2d 679, 682 (Tex. App.—Dallas 1988, writ denied) (requiring that "denial . . . [must be such] as was reasonably calculated to cause and probably did cause, the rendition of an improper judgment").

241. Chapa v. Garcia, 848 S.W.2d 667, 668 (Tex. 1992, orig. proceeding) (quoting Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553 (Tex. 1990, orig. proceeding)); *see* State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (stating that "[d]iscovery is . . . the linchpin in the search for truth . . . .").

242. TEX. R. CIV. P. 215(3).

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the district court renders a final judgment."[243] A sanctioned party may not pursue a mandamus unless the trial court abused its discretion and the party does not have an adequate remedy by appeal.[244] If a sanctioned party has an adequate remedy at law, then mandamus is not available.[245] In *TransAmerican Natural Gas Corp. v. Powell*,[246] the supreme court held that if sanctions "have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but do not result in rendition of an appealable judgment, then the eventual remedy by appeal is inadequate."[247]

Whether a trial court's sanction is reviewable by mandamus or by appeal is not clear in every case. "Death penalty" sanctions (striking pleadings and dismissing causes or defaulting defendants) are clearly reviewable by mandamus.[248] A monetary sanction may be reviewed by mandamus if it "raises the real possibility that a party's willingness or ability to continue the litigation will be significantly impaired."[249]

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243. Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991) (quoting Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986)).

244. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992, orig. proceeding); *see* Trans-American Nat. Gas Corp. v. Powell, 811 S.W.2d 913, 919 (Tex. 1991) (focusing on whether adequate remedy by appeal existed).

245. *TransAmerican*, 811 S.W.2d at 919 (citing State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984)).

246. 811 S.W.2d 913, 919 (Tex. 1991).

247. *Id.* at 919.

248. *See id.* (reviewing death penalty sanctions by mandamus). Death penalty sanctions are also limited by constitutional due process. *Id.*; *see also* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19.

249. *Braden*, 811 S.W.2d at 929 (Tex. 1991, orig. proceeding) (noting that large monetary sanction that must be paid before supersedeas and appeal reviewable by mandamus). *But cf.* Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 802 (Tex. 1986, orig. proceeding) (per curiam) (finding sanction of $200 attorney fee not reviewable by mandamus); Street v. Second Court of Appeals, 715 S.W.2d 638, 639-40 (Tex. 1986) (per curiam) (sanction of $1,050 in attorney's fees or striking of pleadings not reviewable by mandamus); Kern v. Gleason, 840 S.W.2d 730, 734, 739 (Tex. App.—Amarillo 1992, orig. proceeding) (sanction of $5,100 in attorney's fees not reviewable by mandamus); Susman Godfrey, L.L.P. v. Marshall, 832 S.W.2d 105, 107, 109 (Tex. App.—Dallas 1992, orig. proceeding) (sanction of $25,000 against law firm and client not reviewable by mandamus). If the court's imposition of monetary sanctions threatens a party's ability to continue the litigation, appeal is an adequate remedy if the court defers payment of the sanction until the court renders final judgment. *Braden*, 811 S.W.2d at 929; *Susman Godfrey*, 832 S.W.2d at 108. To preserve the issue, the sanctioned party must complain that the monetary sanction precludes his access to the court. *Braden*, 811 S.W.2d at 929. If the sanctioned party complains, the trial court must either provide that the sanction is payable at the time a final judgment is rendered or make express written findings after a prompt hearing explaining why the sanction does not have a preclusive effect. *Id.* at

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There is a split among the courts of appeals on the issue of whether the striking of a party's witnesses may be reviewed by mandamus.[250]

Rule 215 permits a wide range of sanctions for a variety of purposes: to secure compliance with the discovery rules, to deter other litigants from similar misconduct, to punish violators,[251] to ensure a fair trial, to compensate a party for past prejudice, and to deter certain bad-faith conduct.[252] The sanctions, however, must be "just."[253] Whether the sanctions are just—in other words, whether the trial court abused its discretion—is determined by a two-prong analysis.

First, a direct relationship must exist between the offensive conduct and the sanction imposed.[254] The sanction imposed against the offending party must be directed against the abuse and toward remedying the prejudice to the innocent party.[255] In other words, the sanctions must relate directly to the abuse.[256]

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929 (citing Thomas v. Capital Sec. Servs., 836 F.2d 866 (5th Cir. 1988)); *e.g.*, Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 850 (Tex. 1992, orig. proceeding); *Ex parte* Conway, 843 S.W.2d 765, 766 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

250. The Beaumont Court of Appeals held that the striking of all of a party's expert witnesses is *not* reviewable by mandamus because the affected party may make a bill of exceptions and present the complaint on appeal. City of Port Arthur v. Sanderson, 810 S.W.2d 476, 477 (Tex. App.—Beaumont 1991, orig. proceeding); *see also* Pope v. Davidson, No. B14-92-01247-CV, 1993 WL 73491, at *9 (Tex. App.—Houston [14th Dist.] Mar. 18, 1993, orig. proceeding) (striking of witness's testimony in part may be presented to and reviewed by court on appeal); Humana Hosp. Corp. v. Casseb, 809 S.W.2d 543, 546 (Tex. App.—San Antonio 1991, orig. proceeding) (striking of expert witness may be reviewed on appeal); Forscan Corp. v. Touchy, 743 S.W.2d 722, 724 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding) (holding that exclusion of two experts not reviewable by mandamus). However, at least one court has held that when an order striking witnesses amounts to an emasculation of a party's defense, then appeal is not an adequate remedy and mandamus will lie. Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 571-72 (Tex. App.—Tyler 1990, orig. proceeding) (per curiam); *e.g.*, Williams v. Crier, 734 S.W.2d 190, 193 (Tex. App.—Dallas 1987, orig. proceeding) (striking of three witnesses reviewable by mandamus). Until a bright line rule is created, which probably will not occur, one must note the analysis of Justice Peeples who succinctly stated: "The law does not permit pretrial mandamus review of witness-exclusion rulings except in extreme cases of complete emasculation [of a party's case]." *Humana Hosp. Corp.*, 809 S.W.2d at 548 (Peeples, J., concurring).

251. *Chrysler Corp.*, 841 S.W.2d at 849; *Bodnow*, 721 S.W.2d at 840 (Tex. 1986).

252. Aetna Casualty & Sur. Co. v. Specia, 36 Tex. Sup. Ct. J. 674, 674-75 (Mar. 24, 1993) (orig. proceeding).

253. Remington Arms Co., Inc. v. Martinez, 36 Tex. Sup. Ct. J. 547, 549 (Feb. 10, 1993) (orig. proceeding); *Blackmon*, 841 S.W.2d at 849; *TransAmerican*, 811 S.W.2d at 917; *see* Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991) (stating that "[j]ustice should not tolerate [discovery] abuse, but injustice cannot remedy it").

254. *TransAmerican*, 811 S.W.2d at 917.

255. *Id.*

256. *Id.*

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Second, the sanction must not be excessive—it must fit the crime.[257] The sanction should not be more severe than necessary to satisfy its legitimate purposes, for example, to promote compliance.[258] In determining if the sanction is just, the appellate court may consider the history of the case, up to and including the sanctions motion.[259] Therefore, the trial court is not limited to considering only the specific violation, but may also consider other conduct that occurred during discovery.[260]

In appropriate cases, the supreme court has encouraged trial judges to prepare written findings that delineate the trial court's reasons for imposing severe sanctions.[261] The reviewing court will review the findings in the same manner as findings in a nonjury case tried on the merits.[262]

M. *Inherent Power To Sanction*

One Texas appellate court has held that Texas trial courts, similar

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257. *Id.*

258. *TransAmerican*, 811 S.W.2d at 917.

259. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986); Hartford Accident & Indem. Co. v. Abascal, 831 S.W.2d 559, 561 (Tex. App.—San Antonio 1992, orig. proceeding); Garcia Distrib., Inc. v. Fedders Air Conditioning, USA, Inc., 773 S.W.2d 802, 806-07 (Tex. App.—San Antonio 1989, writ denied); Overstreet v. Home Indem. Co., 747 S.W.2d 822, 826 (Tex. App.—Dallas 1987, writ denied); Medical Protective Co. v. Glanz, 721 S.W.2d 382, 388 (Tex. App.—Corpus Christi 1986, writ ref'd).

260. *Transamerican*, 811 S.W.2d at 917. In *TransAmerican*, Justice Gonzalez identified fourteen factors commonly used to analyze sanctions under Rule 11 of the Federal Rules of Civil Procedure. *Id.* at 920-21 (Gonzalez, J., concurring). In *Pelt v. Johnson*, 818 S.W.2d 212, 216 (Tex. App.—Waco 1991, orig. proceeding), and *Hanley v. Hanley*, 813 S.W.2d 511, 517-18 (Tex. App.—Dallas 1991, no writ) the Waco and Dallas Courts of Appeals adopted the six factors used by the Third Circuit in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868-70 (3d Cir. 1984), to analyze whether the conduct warranted the particular sanction imposed. *See generally* Lisa A. Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* Transamerican Natural Gas Corp. v. Powell, 23 TEX. TECH L. REV. 617 (1992) (criticizing *TransAmerican* for failing to provide guiding rules and principles for trial courts to follow).

261. *Blackmon*, 841 S.W.2d at 850; *TransAmerican*, 811 S.W.2d at 919 n.9. The supreme court noted three benefits to making findings: first, such findings aid appellate review in that they demonstrate whether the trail judge was guided by a reasoned analysis pursuant to the *TransAmerican* and *Braden* standards; second, such findings assure that the decision was the product of thoughtful judicial deliberation; and third, the articulation of the trail judge's analysis enhances the deterrent effect of the sanctions order. *Blackmon*, 841 S.W.2d at 852.

262. *Blackmon*, 841 S.W.2d at 852 (approving Rossa v. United States Fidelity & Guaranty Co., 830 S.W.2d 668, 672 (Tex. App.—Waco 1992, writ denied) and disapproving *Hartford*, 831 S.W.2d at 560-61).

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to their federal counterparts, have the inherent power to sanction parties for bad faith abuse of the judicial process not covered by rule or statute.[263] The court found that the inherent power exists to deter, alleviate, and counteract bad faith abuse of the judicial process.[264] The record before the trial court must support use of such power, and the trial court must make findings of fact that the abuse interfered significantly with the core functions of the judiciary: hearing evidence, deciding issues of fact raised by the pleadings, deciding issues of law, and entering and enforcing judgment.[265] Because of the amorphous nature of this inherent power and its potency, the court of appeals admonished trial courts to use this power sparingly, and to be mindful of the sanctioned party's due process rights.[266] The scope of review is the entire record before the trial court, and the standard of review is abuse of discretion.[267]

N. *Rule 13 Sanctions*

Texas Rule of Civil Procedure 13, similar to Federal Rule of Civil Procedure 11, directs the trial court to impose appropriate sanctions, under Rule 215(2)(b), if a pleading, motion, or other signed paper is groundless and brought in bad faith or for purposes of harassment.[268]

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263. Kutch v. Del Mar College, 831 S.W.2d 506, 509-10 (Tex. App.—Corpus Christi 1992, no writ) (citing Chambers v. NASCO, Inc., __ U.S. __, __, 111 S. Ct. 2123, 2134, 115 L. Ed. 2d 27, 46-47 (1991)); *see Remington Arms Co.*, 36 Tex. Sup. Ct. J. at 550 (holding that trial court has inherent and statutory power to discipline errant counsel for improper conduct in exercise of its contempt power); Koslow's v. Mackie, 796 S.W.2d 700, 703 (Tex. 1990) (holding that trial court has inherent power under Rule 166 to impose sanctions for violation of pretrial order). *But cf.* Shook v. Gilmore & Tatge Mfg. Co., No. 10-92-014-CV, 1993 WL 56255, at *3 (Tex. App.—Waco, Mar. 3, 1993, n.w.h.) (holding that Texas Supreme Court has not recognized inherent power of Texas courts to sanction party's bad faith conduct during litigation, court declined to follow *Kutch* wholeheartedly). In the federal system, the federal district courts have the inherent powers to levy sanctions for abusive litigation practices. Roadway Express v. Piper, 447 U.S. 752, 766 (1980); *see In re* Stone, 986 F.2d 898, 901-02 (5th Cir. 1993) (citing Eash v. Riggins Trucking, 757 F.2d 557, 562-64 (3d Cir. 1985) (en banc)) (describing three categories of inherent powers of federal courts including power to impose sanctions for abusive litigation practices).

264. *Kutch*, 831 S.W.2d at 510.

265. *Id.*

266. *Id.* at 510-11.

267. *Id.*

268. TEX. R. CIV. P. 13; TEX. R. CIV. P. 215(2)(b); Susman Godfrey, L.L.P. v. Marshall, 832 S.W.2d 105, 108 (Tex. App.—Dallas 1992, orig. proceeding); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 105.002 (Vernon 1986) (providing for recovery of damages for frivolous claims by state agency).

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Under Rule 13, a trial court must presume that the pleading, motion, or other paper is filed in good faith, and may impose sanctions only for good cause.[269] To find that a litigant has violated Rule 13, a trial court must "examine the facts available to the litigant and the circumstances existing at the time the document is filed . . . [and] whether . . . the legal arguments asserted are 'warranted by a good faith argument for the extension, modification or reversal of existing law.' "[270] The court may also consider the amount of time available to prepare the pleading and may "examine the signer's credibility, taking into consideration all of the facts and circumstances available at the time of the filing."[271] A trial court's order under Rule 13 is reviewed under an abuse of discretion standard.[272]

O. *Summary Judgment*

Pursuant to Texas Rule of Civil Procedure 166a(c), a summary judgment is proper only when a movant establishes that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law.[273] In a summary judgment proceeding, the burden of proof is on the movant, and all doubts as to the existence of a genuine issue of fact are resolved against the movant.[274] Once the movant has established a right to summary judgment, the burden shifts to the nonmovant. The nonmovant must then respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment.[275]

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269. *See* Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991) (stating that court should not impose monetary sanction to dispose of litigation); *Susman Godfrey*, 832 S.W.2d at 108 (noting same considerations as *Braden*).

270. Home Owners Funding Corp. of Am. v. Scheppler, 815 S.W.2d 884, 889 (Tex. App.—Corpus Christi 1991, no writ) (quoting, in part, TEX. R. CIV. P. 13).

271. *Id.* "Rule 13 imposes a duty on the trial court to point out with particularity the acts or omissions on which the sanctions are based." Zarsky v. Zurich Management, Inc., 829 S.W.2d 398, 399 (Tex. App.—Houston [14th Dist.] 1992, no writ). "Unlike Rule 215, Rule 13 requires a [trial] court to state any reasons which create 'good cause.' " *Id.*; *e.g.*, Kahn v. Garcia, 816 S.W.2d 131, 133 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).

272. Yang Ming Line v. Port of Houston Auth., 833 S.W.2d 750, 752 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Zarsky*, 829 S.W.2d at 399; Rodriguez v. State Dep't of Highways & Pub. Transp., 818 S.W.2d 503, 504 (Tex. App.—Corpus Christi 1991, no writ); *Scheppler*, 815 S.W.2d at 889.

273. TEX. R. CIV. P. 166a(c); Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972).

274. Roskey v. Texas Health Facilities Comm'n, 639 S.W.2d 302, 303 (Tex. 1982).

275. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979). *See generally* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243 (1989) (discussing procedures for responding to and opposing summary judg-

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The question on appeal "is not whether the summary judgment proof raises a fact issue," but "whether the summary judgment proof establishes as a matter of law that there is no genuine issue of a material fact as to one or more of the essential elements of the plaintiff's cause of action."[276] Summary judgments are reviewed in accordance with the following standards:

> (1) The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.
> (2) In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true.
> (3) Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor.[277]

The usual presumption that the judgment is correct does not apply to summary judgments.[278]

On appeal, evidence that favors the movant's position will be considered rarely, unless it is uncontroverted.[279] Summary judgment, however, may be based on the uncontroverted testimonial evidence of an interested witness or expert "if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."[280]

The scope of review in an appeal from summary judgment is also limited. "Issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal."[281] The grounds for summary judgment must be presented in the motion for summary judgment itself, and the grounds opposing the motion must be expressly presented in written answer to the motion; neither the movant nor the nonmovant may

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ments); David Hittner, *Summary Judgments in Texas*, 22 HOUS. L. REV. 1109, 1133-43 (1985) (discussing summary judgment requirements).

276. Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970).

277. Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985); *e.g.*, Black v. Victoria Lloyds Ins. Co., 797 S.W.2d 20, 23-24 (Tex. 1990); Turboff v. Gertner, Aron & Ledet, Invs., 763 S.W.2d 827, 829 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

278. Montgomery v. Kennedy, 669 S.W.2d 309, 311 (Tex. 1984); Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply, 391 S.W.2d 41, 47 (Tex. 1965).

279. *Great Am. Reserve Ins. Co.*, 391 S.W.2d at 47.

280. TEX. R. CIV. P. 166a(c); *see also* Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986).

281. TEX. R. CIV. P. 166a(c); *Clear Creek Basin Auth.*, 589 S.W.2d at 676.

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rely on reasons set forth in an accompanying brief or in the summary judgment evidence.[282] The appellate court can consider the record only as it existed at the time summary judgment was signed.[283] Moreover, an appellate court may not raise grounds for reversing a summary judgment sua sponte.[284]

When the motion for summary judgment alleges more than one basis of support, and the order granting the motion is silent as to the reason for granting the motion, the appellant must show that each independent ground alleged in the motion is insufficient to support summary judgment, and the summary judgment must be affirmed if any of the theories are meritorious.[285] If the judgment specifies the basis for granting summary judgment, the appellate court cannot affirm on any ground not set forth in the judgment.[286] If the reviewing court determines that summary judgment was improperly granted, the reviewing court will reverse the judgment and remand the cause for a trial on the merits.[287] When both parties file a motion for summary judgment, and one is granted and one is denied, the denial may be considered by the reviewing court only if the appealing party complains of both the granting of the opponent's motion and the denial of his own motion.[288]

P. *Motion for Continuance*

Pursuant to Texas Rule of Civil Procedure 251, a trial court may grant a continuance on sufficient cause supported by affidavit, by consent of the parties, or by operation of law.[289] Whether to grant or deny a motion for continuance is within the sound discretion of the

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282. McConnell v. Southside Indep. Sch. Dist., 36 Tex. Sup. Ct. J. 792, 793-94 (Apr. 21, 1993).

283. Luker v. Arnold, 843 S.W.2d 108, 122 (Tex. App.—Fort Worth 1992, no writ); Johnnie C. Ivy Plumbing Co. v. Keyser, 601 S.W.2d 158, 160 (Tex. Civ. App.—Waco 1980, no writ).

284. San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 210 (Tex. 1990).

285. Rogers v. Ricane Enters., Inc., 772 S.W.2d 76, 79 (Tex. 1989); Valles v. Texas Comm'n on Jail Standards, 845 S.W.2d 284, 287 (Tex. App.—Austin 1992, writ denied); Kyle v. West Gulf Maritime, Ass'n, 792 S.W.2d 805, 807 (Tex. App.—Houston [14th Dist.] 1990, no writ).

286. Maley v. 7111 Southwest Freeway, Inc., 843 S.W.2d 229, 234 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

287. Tobin v. Garcia, 159 Tex. 58, 63, 316 S.W.2d 396, 400 (1958).

288. *Id.*

289. TEX. R. CIV. P. 251; *see* TEX. R. CIV. P. 252 (granting continuance based on absence of material testimony); TEX. R. CIV. P. 253 (granting continuance based on absence of

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trial court.[290] The trial court's ruling will not be reversed unless the record shows a clear abuse of discretion.[291] Before a reviewing court can reverse the trial court's ruling, it should appear clearly from the record that the trial court has disregarded a party's rights.[292] An appellate court may reverse for abuse of discretion only if, after searching the entire record, "it is clear that the trial court's decision was arbitrary and unreasonable."[293]

Q. *Dismissal for Want of Prosecution*

A trial court has a duty and an obligation to maintain control of its docket and to require that each party prosecute its suit with diligence.[294] Thus, "a trial court has the authority to dismiss a case for want of prosecution pursuant to its inherent powers" or pursuant to Texas Rule of Civil Procedure 165a.[295] The trial court's power to dismiss under Rule 165a(1) (the failure to appear at a hearing or trial), under Rule 165a(2) (the failure to meet time standards promulgated by the supreme court), and under Rule 165a(4) (lack of diligence) are cumulative and independent.[296]

Whether the plaintiff prosecuted the case with diligence is an issue

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counsel); TEX. R. CIV. P. 254 (granting continuance based on absence of counsel due to attendance in legislature).

290. State v. Wood Oil Distrib., Inc., 751 S.W.2d 863, 865 (Tex. 1988); Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 634 (Tex. 1986).

291. Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986); State v. Crank, 666 S.W.2d 91, 94 (Tex.), *cert. denied*, 469 U.S. 833 (1984).

292. *Yowell*, 703 S.W.2d at 635; Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc., 740 S.W.2d 873, 874 (Tex. App.—Beaumont 1987, no writ).

293. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987); Gregg v. Cecil, 844 S.W.2d 851, 853 (Tex. App.—Beaumont 1992, no writ); Central Nat'l Gulfbank v. Comdata Network, Inc., 773 S.W.2d 626, 627 (Tex. App.—Corpus Christi 1989, no writ).

294. Texas Soc'y, Daughters of the Am. Revolution, Inc. v. Estate of Hubbard, 768 S.W.2d 858, 861 (Tex. App.—Texarkana 1989, no writ).

295. TEX. R. CIV. P. 165a (1), (4); State v. Rotello, 671 S.W.2d 507, 508-09 (Tex. 1984); Veteran's Land Bd. v. Williams, 543 S.W.2d 89, 90 (Tex. 1976); Bevil v. Johnson, 157 Tex. 621, 625, 307 S.W.2d 85, 87 (1957); Hosey v. County of Victoria, 832 S.W.2d 701, 704 (Tex. App.—Corpus Christi 1992, no writ); Ellmossally v. Huntsman, 830 S.W.2d 299, 300-01 (Tex. App.—Houston [14th Dist.] 1992, no writ); Miller v. Kossey, 802 S.W.2d 873, 877 (Tex. App.—Amarillo 1991, writ denied); Armentrout v. Murdock, 779 S.W.2d 119, 121 (Tex. App.—Houston [1st Dist.] 1989, no writ).

296. TEX. R. CIV. P. 165a(4); *Williams*, 543 S.W.2d 89, 90 (Tex. 1976); City of Houston v. Robinson, 837 S.W.2d 262, 264 (Tex. App.—Houston [1st Dist.] 1992, no writ); Ozuna v. Southwest Bio-Clinical Lab., 766 S.W.2d 900, 901-03 (Tex. App.—San Antonio 1989, writ denied).

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confined solely to the trial court's discretion.[297] To determine the issue of diligence, the court may consider the entire history of the litigation, and no single factor is dispositive.[298] Whether the plaintiff intended to abandon the litigation is not the inquiry, "nor is the existence of a belated trial setting or an asserted eagerness to proceed to trial conclusive."[299] Settlement activity does not excuse want of diligent prosecution,[300] nor does the passive attitude of opposing parties excuse want of diligence.[301] Traditionally, the courts consider: "the length of time the case was on file, the extent of activity in the case, whether a trial setting was requested, and the existence of reasonable excuses for the delay."[302] Other circumstances may also be considered, such as "periods of activity, intervals of inactivity, and the passage of time."[303]

The dismissal may be pursuant to Rule 165a(3), as opposed to the trial court's inherent power. Under Rule 165a(3), the trial court "shall reinstate the case upon finding after a hearing that the failure of the party or his attorney [to appear] was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure had been otherwise reasonably explained."[304] The reinstatement provisions in Rule 165a(3) apply only to dismissals for failure to appear at trial or at a hearing and are slightly similar to the requisites for granting a new trial in a default judgment.[305] The standard of review of a dismissal for want of prosecution or the overruling

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297. *Rotello*, 671 S.W.2d at 508-09 (Tex. 1984); Dolenz v. Continental Nat'l Bank, 620 S.W.2d 572, 575-76 (Tex. 1981); *Ozuna*, 766 S.W.2d at 903; Mercure Co. v. Rowland, 715 S.W.2d 677, 680 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); McCormick v. Shannon West Tex. Memorial Hosp., 665 S.W.2d 573, 575 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

298. Brown v. Howeth Inv., Inc., 820 S.W.2d 900, 903 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Armentrout*, 779 S.W.2d at 121; *Ozuna*, 766 S.W.2d at 903.

299. *Ozuna*, 766 S.W.2d at 903; *see also* Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 843 (Tex. App.—San Antonio 1989, writ denied). "A request at the dismissal docket call hearing that the case be set for trial does not, of itself, preclude dismissal." *Id.* at 843.

300. *Texas Soc'y, Daughters of the Am. Revolution, Inc.*, 768 S.W.2d at 860.

301. *Id.* at 861.

302. *Bard*, 767 S.W.2d at 843; *e.g.*, NASA I Bus. Ctr. v. American Nat'l Ins. Co., 747 S.W.2d 36, 38 (Tex. App.—Houston [1st Dist.]), *writ denied per curiam*, 754 S.W.2d 152 (Tex. 1988).

303. *Ozuna*, 766 S.W.2d at 903.

304. TEX. R. CIV. P. 165a(3); *e.g.*, *Brown*, 820 S.W.2d at 902; Quita v. Haney, 810 S.W.2d 469, 470 (Tex. App.—Eastland 1991, no writ); *Armentrout*, 779 S.W.2d at 122.

305. *Compare Ozuna*, 766 S.W.2d at 903 (stating that Rule 165a(3) applies to reinstatement for failure to appear) *with* Moore v. Armour & Co., 748 S.W.2d 327, 331 (Tex. App.—

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of a motion to reinstate is whether the trial court committed a clear abuse of discretion.[306]

R. *Jury Demand*

While a party has a constitutional right to trial by jury,[307] the right is not unlimited. If a party desires a jury trial, Texas Rule of Civil Procedure 216 requires a party to file a written request for a jury trial with the district clerk within a reasonable time before the trial date, but not fewer than 30 days in advance.[308] Requests made before the thirty-day deadline are "presumed to have been made a reasonable time before trial."[309] The court has no discretion to refuse a jury trial if the fee is paid and the request is made on or before appearance date.[310] In determining whether a late request for a jury trial should be granted or denied, the trial court should ascertain whether "the granting of the jury trial would injure the adverse party" or would result in an interference with the orderly handling of the court's docket or delay the trial of the case.[311] The court will review the

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Amarillo 1988, no writ) (stating that reinstatement provisions of Rule 165a(3) do not apply to dismissal for failure to prosecute with due diligence).

306. *Rotello*, 671 S.W.2d at 509; *e.g.*, *Veteran's Land Bd.*, 543 S.W.2d at 90; *Robinson*, 837 S.W.2d at 264; *Brown*, 820 S.W.2d at 903; *Armentrout*, 779 S.W.2d at 119; *Ozuna*, 766 S.W.2d at 903; Knight v. Trent, 739 S.W.2d 116, 120 (Tex. App.—San Antonio 1987, no writ); Speck v. Ford Motor Co., 709 S.W.2d 273, 276 (Tex. App.—Houston [14th Dist.] 1986, no writ). If the trial court fails to set and conduct a hearing on a motion to reinstate, the dismissal order will be reversed on appeal. *See* Reed v. City of Dallas, 774 S.W.2d 384, 385 (Tex. App.—Dallas 1989, writ denied) (reversing and ordering trial court to conduct hearing; dissent argued court should have reversed and remanded for trial on merits). A dismissal for want of prosecution does not preclude the filing of another suit, and therefore, a dismissal of the case "with prejudice" is improper. Melton v. Rylander, 727 S.W.2d 299, 303 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); Willis v. Barron, 604 S.W.2d 447, 447-48 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). If the trial court dismisses the case "with prejudice," the appellate court will reform the judgment to strike "with prejudice" from the judgment. *Melton*, 727 S.W.2d at 303.

307. TEX. CONST. art. I, § 15, art. V, § 10.

308. TEX. R. CIV. P. 216a.

309. Halsell v. Dehoyos, 810 S.W.2d 371, 371 (Tex. 1991) (per curium); Weng Enters., Inc. v. Embassy World Travel, Inc., 837 S.W.2d 217, 222 (Tex. App.—Houston [1st Dist.] 1992, no writ).

310. Squires v. Squires, 673 S.W.2d 681, 684 (Tex. App.—Corpus Christi 1984, no writ); *cf.* Huddle v. Huddle, 696 S.W.2d 895, 895 (Tex. 1985) (noting that trial court did not abuse discretion in denying request for jury trial when fee was timely paid but request was not made until one day before trial).

311. *Halsell*, 810 S.W.2d at 371; *Weng Enters., Inc.*, 837 S.W.2d at 222; Brawner v. Arellano, 757 S.W.2d 526, 529 (Tex. App.—San Antonio 1988, orig. proceeding) (citing Peck v. Ray, 601 S.W.2d 165, 167 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)).

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entire record and order to determine the condition of the trial docket when the litigant made the untimely request.[312]

Without a statement of facts or order reflecting the trial docket status, the appellate court "must assume that the trial court found the jury docket too crowded to accommodate [the] . . . untimely request."[313] The trial court's decision will be set aside only upon the showing of an abuse of discretion.[314] "The decision, in order to be an abuse of discretion, must be so arbitrary and unreasonable as to amount to a clear and prejudicial error of law."[315]

S. *Judicial Notice*

Pursuant to Rule 202 of the Texas Rules of Civil Evidence, a trial court "upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States."[316] The party seeking judicial notice should furnish the court enough information "to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request."[317] Determination of whether a party has complied with these requirements is within the discretion of the trial court.[318] The sufficiency of a motion to take judicial notice "is a question best answered by the trial court."[319] However, "once the law has been invoked by proper motion, the trial

312. *Brawner*, 757 S.W.2d at 529 (citing Peck v. Ray, 601 S.W.2d 165, 167 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.)).

313. *Id.*

314. *See id.* at 528 (noting factors constituting on abuse of discretion).

315. Wright v. Brooks, 773 S.W.2d 649, 651 (Tex. App.—San Antonio 1989, writ denied) (citing King v. Guerra, 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio 1927, writ ref'd). "A refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified." *Halsell*, 810 S.W.2d at 372; *Weng Enters., Inc.*, 837 S.W.2d at 222.

316. TEX. R. CIV. EVID. 202.

317. *Id.*

318. Daugherty v. Southern Pac. Transp. Co., 772 S.W.2d 81, 83 (Tex. 1989) (finding that failure to plead statute or regulation is not proper ground for trial court's refusal to judicially notice it).

319. Keller v. Nevel, 699 S.W.2d 211, 211 (Tex. 1985). The appellate courts may also take judicial notice of their own records. Victory v. State, 138 Tex. 285, 288, 158 S.W.2d 760, 763 (1942); Birdo v. Holbrook, 775 S.W.2d 411, 412 (Tex. App.—Fort Worth 1989, writ denied).

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court has no discretion—it must acknowledge that law."[320]

Pursuant to Texas Rule of Civil Evidence 201, a trial judge may also take judicial notice of a fact if it is "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned."[321] Facts that are notorious and indisputable,[322] or well known and easily ascertainable,[323] may be judicially noticed. A trial judge's mere personal knowledge of a fact does not permit the taking of judicial notice of the fact.[324] The test on review is whether the fact to be judicially noticed is "verifiably certain."[325]

T. *Class Certification*

Pursuant to Texas Rule of Civil Procedure 42(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[326]

Additionally, the purported class must establish the requirements of Rule 42(b).[327] For the certification of a class, "the burden of proof is on the plaintiffs to establish the right to maintain the action as a class action."[328] Because the class proponents are not required to make an

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320. *Keller*, 699 S.W.2d at 212; Eppenauer v. Eppenauer, 831 S.W.2d 30, 31 n.1 (Tex. App.—El Paso 1992, no writ).

321. TEX. R. CIV. EVID. 201(b); *e.g.*, Hartley v. Coker, 843 S.W.2d 743, 746 (Tex. App.—Corpus Christi 1992, n.w.h.); Besing v. Smith, 843 S.W.2d 20, 21 (Tex. 1992) (Mauzy, J., dissenting).

322. Harper v. Killion, 162 Tex. 481, 483, 348 S.W.2d 521, 522 (1961); Levit v. Adams, 841 S.W.2d 478, 485 (Tex. App.—Houston [1st Dist.] 1992), *rev'd on other grounds*, 36 Tex. Sup. Ct. J. 677 (Mar. 24, 1993) (per curiam).

323. Barber v. Intercoast Jobbers & Brokers, 417 S.W.2d 154, 158 (Tex. 1967); *Levit*, 841 S.W.2d at 485.

324. Eagle Trucking Co. v. Texas Bitulithic Co., 612 S.W.2d 503, 506 (Tex. 1981).

325. *Id.*; *Levit*, 841 S.W.2d at 485; Butts Retail, Inc. v. Diversified Foods, Inc., 840 S.W.2d 770, 774 (Tex. App.—Beaumont 1992, writ denied).

326. TEX. R. CIV. P. 42(a).

327. *See* TEX. R. CIV. P. 42(b) (providing elements necessary to maintain class action).

328. Clements v. LULAC, 800 S.W.2d 948, 952 (Tex. App.—Corpus Christi 1990, no writ).

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extensive evidentiary showing in support of a motion for class certification, the trial court may make its decision based on the pleadings or other material in the record.[329] The determination of whether a party is a proper representative of a class and whether a suit should be certified as a class action is reviewed under the abuse of discretion standard of review.[330] Trial courts abuse their discretion by failing to apply the law properly to the undisputed facts.[331]

U. *Recusal*

Pursuant to Texas Rule of Civil Procedure 18a, a party may file a motion to recuse the trial judge at least ten days before the date set for trial or other hearing.[332] Upon a party's filing of the motion, the trial judge must "either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion."[333] Rule 18a(f) provides that if the motion is denied, the order will be reviewed for an abuse of discretion.[334] An order granting a motion is not reviewable.[335]

V. *Management of Docket*

Trial courts are given wide discretion to manage their dockets.[336]

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329. *Id.* (citing National Gypsum Co. v. Kirbyville Indep. Sch. Dist., 770 S.W.2d 621, 627 (Tex. App.—Beaumont 1989, writ dism'd w.o.j.); Life Ins. Co. of the Southwest v. Brister, 722 S.W.2d 764, 770 (Tex. App.—Fort Worth 1986, no writ).

330. Parker County v. Spindletop Oil & Gas Co., 628 S.W.2d 765, 769 (Tex. 1982); Dresser Indus., Inc. v. Snell, 847 S.W.2d 367, 371 (Tex. App.—El Paso 1993, no writ); Angeles/Quinoco Sec. Corp. v. Collison, 841 S.W.2d 511, 512 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Clements*, 800 S.W.2d at 952. In the absence of controlling Texas law, the appellate court, in reviewing the trial court's order, will look to federal law since Rule 42 is patterned after its federal counterpart. *Dresser Indus., Inc.*, 847 S.W.2d at 372 n.3; Adams v. Reagan, 791 S.W.2d 284, 288 (Tex. App.—Fort Worth 1990, no writ).

331. *Angeles/Quinoco Sec. Corp.*, 841 S.W.2d at 512. The reviewing court is required to view the evidence in a light most favorable to the trial court's action. *Dresser Indus., Inc.*, 847 S.W.2d at 371-72.

332. TEX. R. CIV. P. 18a(a). If a judge is assigned to a case within the ten-day period, then the motion must "be filed at the earliest practicable time prior to the commencement of the trial or other hearing. TEX. R. CIV. P. 18a(e). The grounds disqualification are set forth in TEX. CONST. art. V, § 11 and TEX. R. CIV. P. 18b.

333. TEX. R. CIV. P. 18a(c), (d).

334. TEX. R. CIV. P. 18a(f); *e.g.*, J-IV Inv. v. David Lynn Mach., Inc., 784 S.W.2d 106, 107 (Tex. App.—Dallas 1990, no writ); CNA Ins. Co. v. Scheffey, 828 S.W.2d 785, 792-93 (Tex. App.—Texarkana 1992, writ denied).

335. TEX. R. CIV. P. 18a(f).

336. Clanton v. Clark, 639 S.W.2d 929, 931 (Tex. 1982); Employers Ins. of Wausau v.

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A trial court's order relevant to the management of its docket is reviewed for an abuse of discretion.[337]

W. *Gag Orders*

A trial court may issue a gag order that prohibits discussion of a case outside of the courtroom. The order is reviewed as presumptively unconstitutional.[338] To rebut this presumption, a party must show that the order is supported by specific findings based on evidence establishing that (1) an imminent and irreparable harm to the judicial process will deprive the litigants of a just resolution of their dispute, and (2) the order represents the least restrictive means available to prevent the harm.[339] The specific findings may be challenged for their sufficiency. It appears that the two-part constitutional test is a question of law; and the trial court's findings are to be reviewed de novo.

X. *Sealing Court Records*

Texas Rule of Civil Procedure 76a dictates very specific guidelines a trial court must follow in determining whether to seal court records.[340] Court records are presumed to be open to the public.[341] Any order on a motion to seal or unseal public records must be supported by specific findings of fact that the requirements of Rule 76a(1) have been met.[342] A party seeking to seal records must establish entitlement to the order by a preponderance of the evidence.[343] Any or-

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Horton, 797 S.W.2d 677, 680 (Tex. App.—Texarkana 1990, no writ); *see also* Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (recognizing inherent power of trial courts "to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity").

337. *Clanton*, 639 S.W.2d at 931; *Employers Ins. of Wausau*, 797 S.W.2d at 680.

338. Davenport v. Garcia, 834 S.W.2d 4, 10 (Tex. 1992, orig. proceeding).

339. *Id.* The supreme court has not addressed whether the *Davenport* test is also applicable to situations not involving a gag order in civil proceedings (that is the difference between the right of access and the right to be free from prior restraint). Dallas Morning News v. Fifth Court of Appeals, 842 S.W.2d 655, 659 (Tex. 1992, orig. proceeding).

340. TEX. R. CIV. P. 76a; Chandler v. Hyundai Motor Co., 844 S.W.2d 882, 884-85 (Tex. App.—Houston [1st Dist.] 1992, no writ); Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992, orig. proceeding); Chandler v. Hyundai Motor Co., 829 S.W.2d 774, 775 (Tex. 1992) (per curiam); Upjohn Co. v. Freeman, 847 S.W.2d 589, 590 (Tex. App.—Dallas 1992, no writ) (noting that Rule 76(a) provides guiding rules and principles for sealing court records).

341. TEX. R. CIV. P. 76a(1); *Davenport*, 834 S.W.2d at 23.

342. TEX. R. CIV. P. 76a(6).

343. *See Freeman*, 847 S.W.2d at 591-92 (rejecting clear and convincing standard of

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der relating to the sealing or unsealing of court records is subject to immediate appellate review[344] under the abuse of discretion standard of review.[345]

Y. *Dismissal of In Forma Pauperis Proceedings*

When a plaintiff files an affidavit of inability to pay under Texas Rule of Civil Procedure 145 (in forma pauperis), the Texas Civil Practice and Remedies Code Section 13.001 dictates that the trial court has broad discretion to dismiss the suit as frivolous or malicious.[346] In determining whether the action is frivolous, "the court may consider whether: (1) the action's realistic claim of ultimate success is slight; (2) the claim has no arguable basis in law or in fact; or (3) it is clear that the party cannot prove a set of facts in support of the claim."[347] The supreme court has analogized Section 13.001 to its federal counterpart, which allows dismissal of frivolous or malicious actions in federal court.[348] Of the three factors set forth in Section 13.001, the supreme court has essentially approved only the second factor as constitutionally sound—whether the claim has an arguable basis in law or fact.[349] Therefore, before dismissing a petition under Section 13.001(b)(2), the petition must be examined judicially "for a determination of its basis in law and fact."[350] A claim that has no legal basis is one that is based upon an "indisputably meritless legal theory,"[351] and a claim that has no factual basis is one that arises out

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proof); Upjohn Co. v. Marshall, 843 S.W.2d 203, 204 (Tex. App.—Dallas 1992, orig. proceeding) (rejecting clear and convincing standard of proof).

344. TEX. R. CIV. P. 76a(8).

345. *Freeman*, 847 S.W.2d at 590 (citing Dunshie v. General Motors Corp., 822 S.W.2d 345, 347 (Tex. App.—Beaumont 1992, no writ)).

346. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(a)(2) (Vernon Supp. 1993); Carson v. Gomez, 841 S.W.2d 491, 494 (Tex. App.—Houston [1st Dist.] 1992, no writ); Thomas v. Pankey, 837 S.W.2d 826, 828 (Tex. App.—Tyler 1992, no writ); Onnette v. Reed, 832 S.W.2d 450, 452 (Tex. App.—Houston [1st Dist.] 1992, no writ).

347. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001(b) (Vernon Supp. 1993).

348. Johnson v. Lynaugh, 796 S.W.2d 705, 706 (Tex. 1990) (per curiam) (citing 28 U.S.C. § 1915(d) (1988)).

349. *Id.* The supreme court observed that the United States Supreme Court has only approved the same federal factor as appropriate. *Id.* (citing Neitzke v. Williams, 490 U.S. 319, 327 (1989)). Further, the court noted that the Fifth Circuit doubted the validity of the third factor in § 13.001(b)(3). *Id.* (citing Payne v. Lynaugh, 843 F.2d 177, 178 (5th Cir. 1988)).

350. *Carson*, 841 S.W.2d at 494 (citing Spellmon v. Sweeney, 819 S.W.2d 206, 210 (Tex. App.—Waco 1991, no writ)).

351. Thomas v. Holder, 836 S.W.2d 351, 352 (Tex. App.—Tyler 1992, no writ) (quoting *Neitzke*, 490 U.S. at 327).

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of fantastic or delusional scenarios.[352]

V. TRIAL RULINGS

A. *Conduct of Trial in General*

Rulings that relate to the conduct of a trial are largely within the broad discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion.[353] The appellate court will review the entire record for an abuse of discretion[354] and then determine whether any error constituted probable prejudice to the opposing party.[355]

B. *Motion In Limine*

For preservation of error on appeal for the wrongful exclusion of evidence, the record must reflect that the party opposing the motion in limine offered the excluded evidence during the trial and obtained an adverse ruling from the court.[356] If there is a claim of the wrongful admission of evidence, the record must reflect that the party seeking to suppress the evidence made a proper objection when the evidence was actually offered during the trial on the merits.[357] In either event, the standard of review is based on the rule of evidence invoked.[358]

C. *Voir Dire and Challenges for Cause*

The Texas Supreme Court has instructed the trial courts that

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352. *Id.*

353. Schroeder v. Brandon, 141 Tex. 319, 325, 172 S.W.2d 488, 491 (1943); Pitt v. Bradford Farms, 843 S.W.2d 705, 706 (Tex. App.—Corpus Christi 1992, no writ); Marriage of D M B & R L B, 798 S.W.2d 399, 406 (Tex. App.—Amarillo 1990, no writ); *In re* Estate of Hill, 761 S.W.2d 527, 531 (Tex. App.—Corpus Christi 1988, no writ); Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 718 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Looney v. Traders & General Ins. Co., 231 S.W.2d 735, 740 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.); *see* Kreymer v. North Tex. Mun. Water Dist., 842 S.W.2d 750, 752 (Tex. App.—Dallas 1992, no writ) (noting that trial court has broad discretion concerning extent of cross examination allowed).

354. *Pitt*, 843 S.W.2d at 706-07; *Adams*, 754 S.W.2d at 718.

355. *Pitt*, 843 S.W.2d at 706, 708 (citing Silcott v. Oglesby, 721 S.W.2d 290, 293 (Tex. 1986)).

356. CLS Associates, Ltd. v. A__ B__, 762 S.W.2d 221, 224 (Tex. App.—Dallas 1988, no writ); National Living Ctrs., Inc. v. Cities Realty Corp., 619 S.W.2d 422, 425 (Tex. Civ. App.—Texarkana 1981, no writ).

357. Wilkins v. Royal Indem. Co., 592 S.W.2d 64, 66-67 (Tex. Civ. App.—Tyler 1979, no writ).

358. *See generally* Part VII, *infra*.

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"broad latitude should be allowed to a litigant during voir dire examination [to] enable the litigant to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised."[359] Although voir dire examination is largely within the sound discretion of the trial court, the trial court abuses this discretion when its denial of the right to ask a proper question prevents determination of "whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges."[360] To obtain a reversal, the complaining party must show that the trial court abused its discretion and that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment.[361]

The question of whether bias and prejudice exists is ordinarily a fact question.[362] If the evidence shows that a prospective juror has a state of mind in favor of or against a litigant or type of suit, rendering him unable to act with impartiality and without prejudice, he is disqualified as a matter of law.[363] However, when the evidence is not conclusive as a matter of law, the reviewing court must consider the evidence in a light most favorable to the trial court's ruling.[364] Once bias or prejudice is established, a legal disqualification exists, and reversible error results if the court overrules a motion to strike.[365]

D. *Alignment of Parties and Allocation of Peremptory Strikes*

Questions regarding alignment and antagonism of the parties often arise in multiple party litigation.[366] Under Texas Rule of Civil Procedure 233, the trial judge is required to avoid antagonism between parties on the same side of a case before assigning to the parties the

359. Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705, 709 (Tex. 1989). Bias and prejudice are statutory grounds for disqualification. TEX. GOV'T CODE ANN. § 62.105 (Vernon Supp. 1993).

360. *Babcock*, 767 S.W.2d at 709; *see* TEX. R. CIV. P. 228 (authorizing challenges for cause).

361. TEX. R. CIV. P. 228.

362. Snap Shop v. Fortune, 365 S.W.2d 151, 154 (Tex. 1963); *e.g.*, Powers v. Palacios, 794 S.W.2d 493, 496 (Tex. App.—Corpus Christi 1990), *rev'd on other grounds*, 813 S.W.2d 489 (Tex. 1991).

363. Gum v. Schaefer, 683 S.W.2d 803, 807 (Tex. App.—Corpus Christi 1984, no writ).

364. *Id.*

365. Compton v. Henrie, 364 S.W.2d 179, 181-82 (Tex. 1983).

366. Amis v. Ashworth, 802 S.W.2d 379, 385 (Tex. App.—Tyler 1990, orig. proceeding [leave denied]) (Ramey, C.J., dissenting).

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number of peremptory challenges.[367] A trial court may grant a motion to realign a party as a plaintiff only when the burden on the entire case rests on the defendant or the defendant makes the required admissions before trial.[368] On mandamus review, the appellate court reviews the record as it existed at the time the motion was heard to determine if the court abused its discretion.[369] On appellate review, the appellate court is required to consider the entire record to determine if the court abused its discretion, and if the court's action constituted reversible error.[370]

The existence of antagonism between parties, per se, is a question of law.[371] In determining whether antagonism exists, the trial court must consider the pleadings, information disclosed by pretrial discovery, information and representations made during voir dire of the jury panel, and any information brought to the attention of the trial court before the parties exercise their strikes.[372] The antagonism must be determined finally after voir dire and prior to the exercise of the strikes.[373] "The existence of antagonism is not a discretionary matter; it is a question of law determined from the above factors whether any litigants on the same side of the docket are antagonistic with respect to an issue that the jury will be asked to answer."[374]

The nature and degree of the antagonism, and its effect on the number of peremptory jury strikes allocated to each litigant or side, however, are matters left to the discretion of the trial court.[375] In considering the number of peremptory challenges to be allocated between the litigants or sides, the trial court "must determine, based on the information gleaned from pleadings, pretrial discovery, and representation made during voir dire examination, what antagonism, if

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367. TEX. R. CIV. P. 233; Perkins v. Freeman, 518 S.W.2d 532, 533-34 (Tex. 1974); *Amis*, 802 S.W.2d at 385 (Ramey, C.J., dissenting).

368. *Amis*, 802 S.W.2d at 384 (citing TEX. R. CIV. P. 266).

369. *Id.* at 384 n.7.

370. *Id.* at 383.

371. Garcia v. Central Power & Light Co., 704 S.W.2d 734, 736 (Tex. 1986); Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979); Diamond Shamrock Corp. v. Wendt, 718 S.W.2d 766, 768 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

372. Webster v. Lipsey, 787 S.W.2d 631, 638 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *Garcia*, 704 S.W.2d at 736; *Dunn*, 592 S.W.2d at 919.

373. *Garcia*, 704 S.W.2d at 736.

374. *Dunn*, 592 S.W.2d at 919; American Cyanamid Co. v. Frankson, 732 S.W.2d 648, 652 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

375. *Wendt*, 718 S.W.2d at 769.

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any, exists between the parties."[376] "In multiple party cases, the trial judge shall equalize the number of peremptory challenges so that no litigant or side is given an unfair advantage and so as to promote the ends of justice."[377] Whether the trial court abused its discretion in its allocation of peremptory challenges is determined at the time the court made its decision and not in hindsight.[378] Thus, if the trial court's decision is based upon a reasonable assessment of the situation before it at the time the challenges are made, there is no abuse of discretion.[379] If, however, the trial court has ignored the posture of the parties, or has misconstrued or overlooked a vital factor, its decision should be reversed as an abuse of discretion.[380] The harmless error rule applies to the allocation of peremptory challenges given to a party; therefore, to obtain a reversal, the complaining party must establish, based on the entire record, that the trial was "materially unfair."[381] On the other hand, "when the evidence is sharply conflicting and the trial is hotly contested, the error results in a materially unfair trial without showing more."[382]

E. *Opening Statements*

The trial court has broad discretion to limit opening statements subject only to review for abuse of discretion.[383] While it is error to discuss evidence that is not eventually offered at the trial,[384] the error is reversible only if it was calculated to and probably did cause the rendition of an improper judgment.[385]

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376. Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 4-5 (Tex. 1986); *e.g.*, Webster v. Lipsey, 787 S.W.2d 631, 638 (Tex. App.—Houston [1st Dist.] 1990, writ denied); *Wendt*, 718 S.W.2d at 769.

377. TEX. R. CIV. P. 233; *Wendt*, 718 S.W.2d at 769.

378. *Frankson*, 732 S.W.2d at 653, 660 (citing *Garcia*, 704 S.W.2d at 737).

379. *Id.*

380. *Id.*

381. *Garcia*, 704 S.W.2d at 737; Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 820-21 (Tex. 1980); *Dunn*, 592 S.W.2d at 920-21.

382. *Garcia*, 704 S.W.2d at 737; *Dunn*, 592 S.W.2d at 921.

383. Ranger Ins. Co. v. Rogers, 530 S.W.2d 162, 170 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

384. *Id.*

385. Texas Employers' Ins. Ass'n v. Garza, 675 S.W.2d 245, 249 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

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F. *Trial, Postverdict, and Postjudgment Trial Amendments*

Pleading amendments within seven days of trial,[386] or thereafter under Texas Rule of Civil Procedure 63, and postverdict pleading amendments under Rule 66, must be granted unless the opposing party objects and presents evidence of surprise or prejudice. If the amendment asserts a new cause of action or defense, it is prejudicial on its face.[387] If the amendment is procedural in nature—for example, the amendment conforms the pleadings to the evidence at trial—the trial court must grant the amendment.[388] However, if the amendment is substantive in nature—for example, the amendment changes the bases of a party's defense—the trial court has discretion to grant or deny the amendment.[389] Abuse of discretion is the standard of review for the granting of a trial amendment.[390] To establish an abuse of discretion in allowing the amendment, the complaining party must present evidence of surprise or prejudice,[391] and must request a continuance.[392] Mere allegations of surprise or prejudice are insufficient.[393]

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386. The "day of trial" means the day the case is scheduled for trial, not the day the case actually begins trial. *See* H.B. Zachary Co. v. Gonzales, 847 S.W.2d 246, 246-47 & n.2 (Tex. 1993 orig. proceeding) (per curiam) (noting that trial setting date controls unless case is reset more than 30 days from original date). The rule also applies to summary judgment proceedings because a summary judgment hearing is a trial. Goswami v. Metropolitan Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988); Austin Transp. Study Policy Advisory Comm. v. Sierra Club, 843 S.W.2d 683, 687 (Tex. App.—Austin 1992, writ requested); Clade v. Larsen, 838 S.W.2d 277, 280 (Tex. App.—Dallas 1992, writ denied).

387. TEX. R. CIV. P. 63, 66; Chapin & Chapin, Inc. v. Texas Sand & Gravel Co., Inc., 844 S.W.2d 664, 665 (Tex. 1992) (per curiam); Greenhalgh v. Service Lloyds Ins. Co., 787 S.W.2d 938, 939 (Tex. 1990). Surprise may be shown as a matter of law if the pleading asserts a new and independent cause of action or defense. Bell v. Moores, 832 S.W.2d 749, 757 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

388. *Chapin & Chapin, Inc.*, 844 S.W.2d at 665 (citing *Greenhalgh*, 787 S.W.2d at 939-40).

389. *Id.* (citing Hardin v. Hardin, 597 S.W.2d 347, 350 (Tex. 1980)).

390. *Greenhalgh*, 787 S.W.2d at 940-41; Houston Cable TV, Inc. v. Inwood West Civic Ass'n, 839 S.W.2d 497, 500 (Tex. App.—Houston [14th Dist.] 1992, writ requested); *Clade*, 838 S.W.2d at 280; AMSAV Group, Inc. v. American Sav. & Loan Ass'n, 796 S.W.2d 482, 490 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

391. *Greenhalgh*, 787 S.W.2d at 940-41; *Houston Cable TV, Inc.*, 839 S.W.2d at 500; *Clade*, 838 S.W.2d at 280.

392. Resolution Trust Corp. v. Cook, 840 S.W.2d 42, 46 (Tex. App.—Amarillo 1992, writ denied); James v. Texas Dep't of Human Servs., 836 S.W.2d 236, 238 (Tex. App.—Texarkana 1992, no writ); Louisiana & Arkansas Ry. Co. v. Blakely, 773 S.W.2d 595, 597 (Tex. App.—Texarkana 1989, writ denied).

393. Wingate v. Hajdik, 795 S.W.2d 717, 721 (Tex. 1990) (Spears, J., dissenting).

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While the trend is to give trial courts wide latitude in allowing amendments, postjudgment trial amendments are not permitted.[394]

G. *Evidence*

Admitting and excluding evidence are matters "within the discretion of the trial court."[395] To obtain reversal of a judgment, based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error was calculated to cause and probably did cause rendition of an improper judgment.[396] The supreme court has recognized the impossibility of prescribing a specific test for determining whether the erroneous admission or exclusion of evidence was reasonably calculated to cause and probably did cause the rendition of an improper judgment.[397] The complaining party is not required to prove that "but for" the error a different judgment would necessarily have resulted.[398] Instead, the complaining party must only show that the error "probably" resulted in an improper judgment.[399] In making this determination, the appellate court must review the entire record.[400] "Reversible error does not usually occur in connection with evidentiary rulings unless the appellant can demonstrate that the whole case turns on the particular evidence admitted or excluded."[401] Further,

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394. Boarder to Boarder Trucking, Inc. v. Mondi, Inc., 831 S.W.2d 495, 499 (Tex. App.—Corpus Christi 1992, no writ).

395. Tracy's v. Annie's Attic, Inc., 840 S.W.2d 527, 531 (Tex. App.—Tyler 1992, writ denied).

396. TEX. R. APP. P. 81(b)(1); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989); West Tex. Gathering Co. v. Exxon Corp., 837 S.W.2d 764, 775 (Tex. App.—El Paso 1992, writ granted).

397. McCraw v. Maris, 828 S.W.2d 756, 757 (Tex. 1992); Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 821 (Tex. 1980); Ponder v. Texarkana Memorial Hosp., 840 S.W.2d 476, 479 (Tex. App.—Houston [14th Dist.] 1991, no writ).

398. *McCraw*, 828 S.W.2d at 758; Texas Power & Light Co. v. Hering, 148 Tex. 350, 353, 224 S.W.2d 191, 192 (1949).

399. *McCraw*, 828 S.W.2d at 758; King v. Skelly, 452 S.W.2d 691, 696 (Tex. 1970); LSR Joint Venture No. 2 v. Callewart, 837 S.W.2d 693, 699 (Tex. App.—Dallas 1992, writ denied).

400. *McCraw*, 828 S.W.2d at 758 (citing Gee v. Liberty Mut. Ins. Co., 765 S.W.2d at 396; *Lorusso*, 603 S.W.2d at 821); *e.g.*, Jamail v. Anchor Mortgage Servs., Inc., 809 S.W.2d 221, 223 (Tex. 1991) (per curiam).

401. *West Tex. Gathering Co.*, 837 S.W.2d at 775 (citing Shenandoah Assoc. v. J & K Properties, Inc., 741 S.W.2d 470, 494 (Tex. App.—Dallas 1987, writ denied)); Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 837 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)); *see also* Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 185 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

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error in the improper admission of evidence is usually deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection,[402] or if the evidence is merely cumulative of properly admitted evidence.[403]

H. *Bifurcation of Trial on Punitive Damages*

A trial court may generally order a bifurcated trial on punitive damages under the "Wyoming Plan."[404] Under the Wyoming Plan, if the evidence at trial establishes a fact issue regarding punitive damages, the charge should include questions concerning the awarding of both compensatory and punitive damages.[405] If the jury determines that punitive damages should be awarded, it then hears evidence of the defendant's net worth and returns a separate verdict setting the amount of punitive damages.[406] A trial court's action ordering a bifurcated trial under Rule 174(b) is not an abuse of discretion,[407] and will not be the basis for reversal unless the complaining party can show reversible error under Texas Rule of Appellate Procedure 81(b).[408]

I. *Motion for Directed or Instructed Verdict*

1. Jury Trials

A directed or instructed verdict is proper under Texas Rule of Civil Procedure 301[409] when:

(1) a defect in the opponent's pleadings makes them insufficient to sup-

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402. Richardson v. Green, 677 S.W.2d 497, 501 (Tex. 1984); *Shenandoah Assoc.*, 741 S.W.2d at 494.

403. *Jamail*, 809 S.W.2d at 223; McInnes v. Yamaha Motor Corp., 673 S.W.2d 185, 188 (Tex. 1984), *cert. denied*, 469 U.S. 1107 (1985); Rampel v. Wascher, 845 S.W.2d 918, 922 (Tex. App.—San Antonio 1992, writ denied); City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 791 (Tex. App.—Dallas 1992, writ denied).

404. Miller v. O'Neill, 775 S.W.2d 56, 57 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding); *see* Lunsford v. Morris, 746 S.W.2d 471, 475 (Tex. 1988) (Gonzales, J., dissenting) (favoring Wyoming Plan for Texas practice). *Contra* Greater Houston Transp. Co. v. Zrubeck, No. 13-91-426-CV, 1993 WL 24002, at *37 n.8 (Tex. App.—Corpus Christi, Feb. 4, 1993, n.w.h.) (criticizing Wyoming Plan).

405. *Id.* (citing Campen v. Stone, 635 P.2d 1121, 1132 (Wyo. 1981)).

406. *Id.*

407. *Id. Contra Zrubeck*, 1993 WL 24002, at *23 (stating that jury verdict would be set aside only if clearly wrong and unjust).

408. TEX. R. APP. P. 81(b).

409. TEX. R. CIV. P. 301.

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port a judgment; (2) the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) the evidence offered on a cause of action is insufficient to raise an issue of fact.[410]

In reviewing the granting of a directed or instructed verdict by the trial court on an evidentiary basis, the reviewing court will "determine whether there is any evidence of probative force to raise fact issues on the material questions presented."[411] The court considers "all of the evidence in a light most favorable to the party against whom the verdict was instructed, . . . and disregards all contrary evidence and inferences," and gives the losing party the benefit of all reasonable inferences created by the evidence.[412] Every reasonable intendment deductible from the evidence is to be indulged in the nonmovant's favor.[413] If there is any conflicting evidence of probative value on any theory of recovery, the issue is for the jury, and an instructed verdict is improper. The case must be reversed and remanded for the jury's determination on that issue.[414] When no evidence of probative force on an ultimate fact element exists, or when

410. Edlund v. Bounds, 842 S.W.2d 719, 723-24 (Tex. App.—Dallas 1992, writ denied); M.N. Dannenbaum, Inc. v. Brummerhop, 840 S.W.2d 624, 629 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 90 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.); Texas Employers' Ins. Ass'n v. Duree, 798 S.W.2d 406, 408 (Tex. App.—Fort Worth 1990, writ denied); Rudolph v. ABC Pest Control, Inc., 763 S.W.2d 930, 932 (Tex. App.—San Antonio 1989, writ denied); McCarley v. Hopkins, 687 S.W.2d 510, 512 (Tex. App—Houston. [1st Dist.] 1985, no writ); Rowland v. City of Corpus Christi, 620 S.W.2d 930, 932-33 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

411. Collora v. Navarro, 574 S.W.2d 65, 68 (Tex. 1978). Justice Cohen has suggested that the scope of review for a directed verdict should be the evidence as it stood when the motion for directed verdict was denied. Sipco Servs. Marine, Inc. v. Wyatt Field Serv. Co., No. 01-91-00916-CV, 1993 WL 82707, at *20 (Tex. App.—Houston [1st Dist.], Mar. 25, 1993, n.w.h.) (Cohen, J., concurring). Thus, if the defendant moved for a directed verdict at the close of the plaintiff's case, then only the evidence to that point would be considered in reviewing the trial court's order. *Id.* If the defendant moved for a directed verdict at the close of all the evidence, then all the evidence would be reviewed on appeal. *Id.* Justice Cohen would apply this rule to both nonjury and jury case. *Id.*

412. White v. Southwestern Bell Tel. Co., 651 S.W.2d 260, 262 (Tex. 1983); *e.g.*, Qantel Business Sys. v. Custom Controls, 761 S.W.2d 302, 303 (Tex. 1988); *Collora*, 574 S.W.2d at 68; University Nat'l Bank v. Ernst & Whinney, 773 S.W.2d 707, 709 (Tex. App.—San Antonio 1989, no writ); *Rudolph*, 763 S.W.2d at 932; Graziadei v. D.D.R. Mach. Co., 740 S.W.2d 52, 55-56 (Tex. App.—Dallas 1987, writ denied).

413. Trehnolm v. Ratcliff, 646 S.W.2d 927, 931 (Tex. 1983); *Collora*, 574 S.W.2d at 68; *University Nat'l Bank*, 773 S.W.2d at 709.

414. *White*, 651 S.W.2d at 262; Jones v. Tarrant Util. Co., 638 S.W.2d 862, 865 (Tex. 1982); *Collora*, 574 S.W.2d at 68; Texas Employers' Ins. Ass'n v. Page, 553 S.W.2d 98, 102 (Tex. 1977); Henderson v. Traveler's Ins. Co., 544 S.W.2d 649, 650 (Tex. 1976).

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the probative force of slight testimony is so weak that only a mere surmise or suspicion is raised as to the existence of essential facts, the trial court has the duty to instruct the verdict.[415] The reviewing court may affirm a directed verdict even if the trial court's rationale for granting the directed verdict is erroneous, provided it can be supported on another basis.[416]

2. Nonjury Trials

In a nonjury trial, the judge "serves the dual capacity of fact finder and magistrate" and "has the power and the duty to weigh the evidence, draw inferences and make reasonable deductions from the evidence and to believe or disbelieve all or part of it."[417] Previously, the granting of a motion for judgment in a nonjury trial was the legal equivalent of the granting of a directed verdict in a jury trial.[418] Since those two actions were deemed equivalent, the appellate standard of review for reviewing the propriety of a directed verdict granted in a jury trial was held to be equally applicable to review of a granted motion for judgment in a nonjury trial.[419] Thus, the "trial judge could grant a motion for judgment at the close of the plaintiff's case only when there was no evidence to support the plaintiff's cause of action."[420] The trial judge who was unpersuaded by the plaintiff's evidence, but could find some evidence supporting the claim, was required to hear the defendant's case before ruling on the factual sufficiency of the evidence.[421] The supreme court overruled that line of cases in *Qantel Business Systems, Inc. v. Custom Controls Co.*,[422] and held that when the plaintiff rests his case, on motion for judgment by the defendant, the judge "has the power to rule on both the factual and legal issues" and "to make factual findings at that time if requested by a party."[423] On appeal, the legal and factual sufficiency of

415. Porterfield v. Brinegar, 719 S.W.2d 558, 559 (Tex. 1986); *Kelly*, 832 S.W.2d at 90-91; *University Nat'l Bank*, 773 S.W.2d at 709.

416. *Kelly*, 832 S.W.2d at 90.

417. Qantel Business Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302, 306 (Tex. 1988) (Gonzalez, J. concurring).

418. *Id.* at 303.

419. *Id.* at 303-04.

420. *Id.* at 304.

421. *Qantel Business Sys., Inc.*, 761 S.W.2d at 304.

422. 761 S.W.2d 302 (Tex. 1988).

423. *Id.*; *e.g.*, Chase Commercial Corp. v. Datapoint Corp., 774 S.W.2d 359, 362 (Tex. App.—Dallas 1989, no writ).

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the evidence to support the judgment may be challenged as in any other nonjury case.[424] The standards of review applicable in nonjury cases are discussed in Part VII.

J. *Charge of the Court*

Great confusion exists regarding the standard of review for complaints about the court's charge to the jury.[425] The confusion is due to the existence of different standards for different aspects of charge practice, which courts sometimes fail simplistically to limit to their proper procedural context.[426]

1. Questions

Texas Rule of Civil Procedure 278 provides that "[t]he court shall submit the questions . . . in the form provided by Rule 277, which are raised by the written pleadings and the evidence."[427] The supreme court has interpreted Rule 278 as providing "a substantive, non-discretionary directive to trial courts requiring them to submit requested questions to the jury if the pleadings and any evidence support them."[428] Thus, as "long as matters are timely raised and properly requested as part of a trial court's charge," a judgment must be reversed "when a party is denied proper submission of a valid theory of recovery or a vital defensive issue raised by the pleadings and evidence."[429]

It seems, however, that the question of whether the charge has sub-

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424. *Qantel Business Sys., Inc.*, 761 S.W.2d at 304.

425. *See* State Dep't of Highways & Public Transp. v. Payne, 838 S.W.2d 235, 240-41 (Tex. 1992) (lamenting that "[t]he rules governing charge procedures are difficult enough; the caselaw applying them has made compliance a labyrinth daunting to the most experienced trial lawyer"). In *Payne*, the court severely criticized the traps involved in preserving error at the charge stage of the trial. *Id.* at 240. The court stated:

> The procedure for preparing and objecting to the jury charge has lost its philosophical moorings. There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

Id. at 241.

426. *See, e.g.*, Tex. Dep't of Human Serv. v. E. B., 802 S.W.2d 647, 649 (Tex. 1990). "The standard for review of the charge is abuse of discretion, [which] occurs only when the trial court acts without reference to any guiding principle." *Id.*

427. TEX. R. CIV. P. 278.

428. Elbaor v. Smith, 845 S.W.2d 240, 243 (Tex. 1992).

429. Exxon Corp. v. Perez, 842 S.W.2d 629, 631 (Tex. 1992).

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mitted the controlling issues in the case—in terms of theories of recovery or defense—should be a question of law reviewable de novo.[430] Other objections, such as whether the issue in question was not supported by the pleadings,[431] whether there is no cause of action or defense under the substantive law,[432] and whether the evidence is not legally sufficient to support submission[433] should also be reviewed de novo because each complaint raises a question of law. Whether a trial court should submit a theory by questions or instructions should be reviewed under an abuse of discretion test, recognizing, however, that there is a presumption in favor of broad-form submission of questions.[434] Yet, when an element of a theory has been omitted in the questions or instructions—either because the court believed that it was established as a matter of law or because an element of the theory of recovery was omitted—the appropriate standard of review should be de novo.[435]

2. Instructions and Definitions

The court should explain to the jury any legal or technical terms contained in instructions and definitions.[436] The essential question the trial court must determine is whether the instruction or definition aids the jury in answering the questions.[437] An appellate court will review a trial court's decision to submit a particular instruction or

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430. *See* Continental Casualty Co. v. Street, 379 S.W.2d 648, 651 (Tex. 1964) (reviewing issue submitted to jury at trial court).

431. *See, e.g.*, McLellan Elec. Coop., Inc. v. Sims, 376 S.W.2d 924, 927 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.) (discussing contention of issues unsupported by pleadings).

432. *See id.*

433. *Elbaor*, 845 S.W.2d at 244; Brown v. Goldstein, 685 S.W.2d 640, 641 (Tex. 1985); Garza v. Alviar, 395 S.W.2d 821, 824 (Tex. 1965).

434. TEX. R. CIV. P. 277; *E. B.*, 802 S.W.2d at 649; Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 256 (Tex. 1974).

435. *See* State Dep't of Highways & Publ. Transp. v. Payne, 838 S.W.2d 235, 239-40 (Tex. 1992) (noting plaintiff's failure to submit element of his theory of recovery over defendant's objection); McKinley v. Stripling, 763 S.W.2d 407, 410 (Tex. 1989) (noting that plaintiff refused to submit proximate cause issue in informed consent action after defendant properly objected to omission of issue on element and, accordingly, waived issue and could not recover).

436. Lee-Wright, Inc. v. Hall, 840 S.W.2d 572, 578-79 (Tex. App.—Houston [1st Dist.] 1992, no writ); Lumbermens Mut. Casualty Co. v. Garcia, 758 S.W.2d 893, 895 (Tex. App.—Corpus Christi 1988, no writ); K-Mart Corp. v. Trotti, 677 S.W.2d 632, 636 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

437. Louisiana & Ark. Ry. Co. v. Blakely, 773 S.W.2d 595, 598 (Tex. App.—Texarkana 1989, writ denied); Harris v. Harris, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

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definition under an abuse of discretion standard. A trial court, accordingly, is given wide latitude to determine the sufficiency of explanatory instructions and definitions.[438] The trial court has considerably more discretion in submitting instructions and definitions than it has in submitting jury questions.[439]

When instructions or definitions are actually given, the question on review is whether the instruction or definition is "proper."[440] "An instruction is proper if it finds support in any evidence of probative value and if it might be of some assistance to the jury in answering the questions submitted."[441] The test of sufficiency for a definition "is its reasonable clarity in performing [its] function."[442] This is reviewed under an abuse of discretion test.[443] However, whether the terms are properly defined or the instruction properly worded should be a question of law reviewable de novo.[444] A de novo standard of review should be used when the complaint is that an explanatory instruction or definition misstates the law[445] or directly comments on the weight of the evidence.[446] If the instruction was improper, the reviewing court must then determine whether the error was harmless.[447]

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438. Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 256 (Tex. 1974); M. N. Dannenbaum, Inc. v. Brummerhop, 840 S.W.2d 624, 631 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

439. *Harris*, 765 S.W.2d at 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

440. TEX. R. CIV. P. 277; *Brummerhop*, 840 S.W.2d at 631; Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182, 187 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

441. *Blakely*, 773 S.W.2d at 598; *see also* Johnson v. Whitehurst, 652 S.W.2d 441, 447 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Steinberger v. Archer County, 621 S.W.2d 838, 841 (Tex. App.—Fort Worth 1981, no writ).

442. *Harris*, 765 S.W.2d at 801.

443. *See id.* (noting trial court's discretion and absence of reversible error).

444. *See Brummerhop*, 840 S.W.2d at 631 (declaring that instruction is improper if it misstates law); Villarreal v. Reza, 236 S.W.2d 239, 241 (Tex. Civ. App.—San Antonio 1951, no writ) (quoting Psimenos v. Huntley, 47 S.W.2d 62, 623 (Tex. Civ. App.—Waco 1932, no writ)) (noting that instruction that fails to properly instruct jury on burden of proof is erroneous).

445. *See, e.g.*, *Harris*, 765 S.W.2d at 801 (reviewing trial court's definition of "marital property" de novo); Bennett v. Bailey, 597 S.W.2d 532, 533 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (applying de novo standard of review to trial court's definition of "unconscionable"); *see also* Wakefield v. Bevly, 704 S.W.2d 339, 350 (Tex. App.—Corpus Christi 1985, no writ) (refusing to review proposed instruction before retrial on remand as instruction could not be considered in light of evidence offered during retrial).

446. *See* City of Pearland v. Alexander, 483 S.W.2d 244, 249 (Tex. 1972) (holding jury instruction erroneous as comment upon weight of evidence after de novo review); American Bakers Ins. Co. v. Caruth, 786 S.W.2d 427, 434-35 (Tex. App.—Dallas 1990, no writ) (holding upon de novo review that trial court improperly commented on weight of evidence).

447. TEX. R. APP. P. 81(b)(1); *Brummerhop*, 840 S.W.2d at 631.

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When the court refuses to submit a requested instruction or definition, the question on review is whether the request was reasonably necessary to enable the jury to render a proper verdict.[448] When the refusal is based on a determination that the request is unnecessary, the abuse of discretion standard of review should apply.[449] Whether the refusal to submit a requested instruction or definition requires reversal is determined by applying the harmless error rule.[450] By contrast, when the complaint is that the instruction or definition was raised by the pleadings, supported by "some evidence," tendered in substantially correct form, or was an element of a ground of recovery or defense in broad-form submission, the complaint presents a legal question, reviewable de novo.[451]

To determine whether an alleged error in the submission of instructions or definitions is reversible, "the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety."[452] "Error will be deemed reversible error only if, when viewed in light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated to cause and probably did cause the rendition of an improper judgment."[453]

K. *Jury Arguments*

To secure reversal of a judgment on the assertion of improper jury

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448. TEX. R. CIV. P. 277; *see Whitehurst*, 652 S.W.2d at 447-48 (holding trial court's refusal to submit proposed instruction not violative of Rule 277); *Steinberger*, 621 S.W.2d at 841 (holding that absent showing that denial of instruction caused improper jury verdict, trial court did not err in refusing proposed instruction).

449. *See* Texas Employers' Ins. Ass'n v. Charles, 381 S.W.2d 664, 668 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.) (holding refused instruction not improper); Brooks v. Taylor, 359 S.W.2d 539, 542 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.) (upholding court's denial of requested instruction).

450. St. James Transp. Co. v. Porter, 840 S.W.2d 658, 664 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (citing Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449, 453-54 (Tex. 1978)).

451. Plancencio v. Allied Indust. Int'l, Inc., 724 S.W.2d 20, 22 (Tex. 1987); Ellison v. Larson, 217 S.W.2d 416, 419 (Tex. Civ. App.—San Antonio 1948), *aff'd*, 147 Tex. 465, 217 S.W.2d 420 (1949); Ornelas v. Moore Serv. Bus Lines, 410 S.W.2d 919, 923 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.); *see* Elbaor v. Smith, 845 S.W.2d 240, 244 (Tex. 1992)(holding that defendant properly preserved error by submitting jury questions in "substantially correct wording").

452. Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986).

453. *Id.*; TEX. R. APP. P. 81(b)(1).

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argument, an appellant must prove: "(1) [that there was] an error; (2) that was not invited or provoked; (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial; and (4) [that] was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the [trial] judge."[454] Additionally, if the argument is incurable, the appellant must also prove "that the argument by its nature, degree, and extent, constitutes reversible error."[455] There are only rare instances of incurable harm from improper argument; for example, appealing to racial prejudice, appealing to a jury to reward or penalize a litigant for belonging or not belonging to a racial or ethnic group, or referring to a defendant corporation as a killer of families.[456] In those cases, the appellant must prove also "that the argument by its nature, degree, and extent, constituted reversibly harmful error" and "that the probability that the improper argument caused harm is greater than the probability that the verdict was based upon proper proceedings and evidence."[457] The length of the argument, whether it was repeated or abandoned, and whether there was cumulative error are proper inquiries.[458] Finally, the reviewing court must evaluate the improper jury argument in light of the whole case, beginning with voir dire and ending with closing argument.[459]

L. *Jury Deliberations*

The scheduling of jury deliberations, the sequestrating of jurors, the granting of jury breaks, and the like are reviewed for an abuse of dis-

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454. Lone Star Ford, Inc. v. Carter, 848 S.W.2d 850, 853 (Tex. App.—Houston [14th Dist.] 1993, writ denied); Texas Health Enters., Inc. v. Krell, 828 S.W.2d 192, 204 (Tex. App.—Corpus Christi), *vacated by agr.*, 830 S.W.2d 922 (1992); *see* TEX. R. CIV. P. 269 (stating procedure applicable argument before jury).

455. *Carter*, 848 S.W.2d at 853.

456. Haryanto v. Saeed, No. C14-92-00846-CV, 1993 WL 122593, at *4 (Tex. App.—Houston [14th Dist.] Apr. 20, 1993, n.w.h.); *Carter*, 848 S.W.2d at 854-55; Texas Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 863, 865 (Tex. App.—San Antonio 1990, writ denied). Justice Peeples's analysis of improper jury argument in Texas in *Guerrero* is comprehensive, thorough, and well reasoned. *See Haryanto*, 1993 WL 122593, at *5 (approving court's analysis in *Guerrero*).

457. *Carter*, 848 S.W.2d 854-55.

458. *Id.*

459. *Id.*; Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 120 (Tex. 1984); Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839-40 (Tex. 1979); Louisiana & Arkansas Ry. Co. v. Capps, 766 S.W.2d 291, 294 (Tex. App.—Texarkana 1989, writ denied).

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cretion.[460] Responses to jury notes are reviewed the same as regular charge practice.[461] Whether to repeat testimony to the jury and the extent of the repetition are discretionary, except that testimony must be reread if the requirements of Texas Rule of Civil Procedure 287[462] are met. In the absence of disagreement between jurors, the court is not obligated to have testimony read back.[463] The trial court has broad discretion in deciding what portion of testimony is relevant to the disputed point.[464]

A trial court has discretion to issue a supplemental charge to the jury ("verdict urging" or "dynamite" charge) or to return a jury for further deliberations in an attempt to reach a verdict. Typically, the complaining party will contend that the jury was coerced into reaching a particular verdict. To test a supplemental charge for coerciveness, a court must break down the supplemental charge into its particulars and analyze each part for possible coercive statements.[465] A potentially coercive charge will not constitute reversible error unless the charge, as a whole, retains its coercive nature when all of the circumstances surrounding its rendition and effect are analyzed.[466] Additionally, the trial court has discretion to determine the length of time a jury is to be held in an effort to reach a verdict.[467] While the trial court has considerable latitude, if the complaining party can show substantial evidence on appeal that it was altogether improbable that the jury would reach a proper verdict if forced to continue deliberations, then the error is reversible.[468]

M. *Jury Misconduct*

When the evidence is conflicting on the question of alleged jury misconduct during jury deliberations, the appellate court will pre-

460. *See* TEX. R. CIV. P. 282 (delineating process of jury deliberations).

461. *See* TEX. R. CIV. P. 286 (allowing jury to receive further instructions).

462. *See* TEX. R. CIV. P. 287 (considering juror disagreement over evidence).

463. *Id.*; Hill v. Robinson, 592 S.W.2d 376, 384 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

464. Wirtz v. Orr, 575 S.W.2d 66, 72 (Tex. Civ. App.—Texarkana 1978, writ dism'd); Aetna Casualty & Sur. Co. v. Scott, 423 S.W.2d 351, 354 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ dism'd by agr.).

465. Stevens v. Traveler's Ins. Co., 563 S.W.2d 223, 229 (Tex. 1978).

466. *Id.* at 229, 232.

467. Shaw v. Greater Houston Transp. Co., 791 S.W.2d 204, 205-06 (Tex. App.—Corpus Christi 1990, no writ).

468. *Id.* at 206.

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sume that misconduct did not occur.[469] To establish jury misconduct, the complaining party must show misconduct occurred that was material and that, based on the record as a whole, probably resulted in harm.[470] A motion for new trial premised on jury misconduct "must be supported by a juror's affidavit alleging that 'outside influences' were brought to bear upon the jury."[471] To obtain a hearing without a juror's affidavit, the party must disclose a reasonable explanation and excuse as to why affidavits cannot be secured, and must also state sufficient particularized allegations of material jury misconduct.[472]

N. *Conflicting Jury Findings*

When determining whether jury findings irreconcilably conflict, the appellate court applies a de novo standard of review.[473] Because this is purely a legal question, the trial court's granting of a new trial on the express basis of irreconcilably conflicting jury findings can be challenged by mandamus.[474]

In reviewing jury findings for conflict, the threshold inquiry is whether the findings address the same material fact.[475] A court may not strike jury answers on the ground of conflict if there is any reasonable basis upon which the answers can be reconciled.[476] The reviewing court must reconcile apparent conflicts in the jury's findings "if

469. Landreth v. Reed, 570 S.W.2d 486, 491 (Tex. Civ. App.—Texarkana 1978, no writ); Texas Employers' Ins. Ass'n v. Phillips, 255 S.W.2d 364, 366 (Tex. Civ. App,—Eastland 1953, writ ref'd n.r.e.); Hudson v. West Cent. Drilling Co., 195 S.W.2d 387, 393 (Tex. Civ. App.—Eastland 1946, writ ref'd n.r.e.).

470. TEX. R. CIV. P. 327a; Redinger v. Living, Inc., 689 S.W.2d 415, 419 (Tex. 1985); Ramsey v. Lucky Stores, Inc., No. 01-90-00741-CV, 1993 WL 77566, at *26 (Tex. App.—Houston [1st Dist.] Mar. 18, 1993, n.w.h.); Bradbury v. State, 503 S.W.2d 619, 623 (Tex. Civ. App.—Tyler 1973, no writ); *Phillips*, 255 S.W.2d at 366.

471. Weaver v. Westchester Fire Ins. Co., 739 S.W.2d 23,24 (Tex. 1987); *Ramsey*, 1993 WL 77566, at *26-27; Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 850 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *see* TEX. R. CIV. P. 327 (regarding juror's ability to testify about deliberations).

472. Ray Jones Lumber Co. v. Murphy, 139 Tex. 478, 483, 163 S.W.2d 644, 646 (1942); *Ramsey*, 1993 WL 77566, at *27.

473. *See* Bender v. Southern Pac. Transp. Co., 600 S.W.2d 257, 260 (Tex. 1980) (reviewing assertion of conflicting jury findings).

474. *See* Indemnity Ins. Co. v. Craik, 346 S.W.2d 830, 831-32 (Tex. 1961) (stating that writ of mandamus would issue unless judge set aside order of mistrial that had been based on conflicting jury findings).

475. *Bender*, 600 S.W.2d at 260.

476. Luna v. Southern Pac. Transp. Co., 724 S.W.2d 383, 584 (Tex. 1987); *Bender*, 600 S.W.2d at 260.

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reasonably possible in light of the pleadings and evidence, the manner of submission, and the other findings considered as a whole."[477] When the issues submitted lead to more than one reasonable construction, the reviewing court will generally adopt the construction that avoids a conflict in the answers.[478]

Appellate review is limited to the question of conflict, and the review of jury findings "is limited to a consideration of the factors before the jury."[479] Similarly, when no conflict exists, the appellate court cannot use the jury's answer to one question to challenge the insufficiency of the evidence supporting the jury's answer to another question.[480]

VI. POSTTRIAL PROCEEDINGS

A. *Motion To Disregard Jury Findings*

A trial court may disregard a jury's finding and grant a motion to disregard jury findings only when there is no evidence to support the jury's finding.[481] If the issue is immaterial or has no support in the evidence, or the evidence establishes a contrary finding, then the court may disregard an answer and substitute its own finding.[482]

In reviewing the grant of a motion to disregard jury findings, the appellate court must consider all testimony in a light most favorable to the verdict, indulging every reasonable inference deductible in its favor.[483] When some evidence supports the disregarded finding, the reviewing court must reverse and render judgment unless the appellee asserts crosspoints showing grounds for a new trial.[484]

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477. *Bender*, 600 S.W.2d at 260.

478. *Id.*

479. *Id.*

480. *See* Huber v. Ryan, 627 S.W.2d 145, 145-46 (Tex. 1981) (holding that jury's findings of injury and zero damages for past pain and suffering could be reconciled).

481. Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 593 (Tex. 1986); Harris County v. McFerren, 788 S.W.2d 76, 78 (Tex. App.—Houston [1st Dist.] 1990, writ denied); Arch Constr., Inc. v. Tyburec, 730 S.W.2d 47, 51 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

482. TEX. R. CIV. P. 301; Eubanks v. Winn, 420 S.W.2d 698, 701 (Tex. 1967); *McFerren*, 788 S.W.2d at 78; U.S. Fire Ins. Co. v. Twin City Concrete, Inc., 684 S.W.2d 171, 173 (Tex. App.—Houston [14th Dist.] 1984, no writ).

483. *Alm*, 717 S.W.2d at 593; Schaefer v. Texas Employers' Ins. Ass'n, 612 S.W.2d 199, 201 (Tex. 1980).

484. Basin Operating Co. v. Valley Steel Prods., 620 S.W.2d 773, 776 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.).

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B. *Motion for Judgment Notwithstanding the Verdict*

A trial court may disregard a jury's findings and grant a motion for judgment notwithstanding the verdict, pursuant to Texas Rules of Civil Procedure 301 and 324(c)[485] only when there is no evidence upon which the jury could have made its findings.[486] In reviewing the grant of a motion for judgment notwithstanding the verdict, the reviewing court must determine whether there is any evidence upon which the jury could have made the finding. The record is "reviewed in the light most favorable to the finding, considering only the evidence and inferences which support them and rejecting the evidence and inferences contrary to the findings."[487] When there is more than a scintilla of competent evidence to support the jury's finding, the judgment notwithstanding the verdict should be reversed.[488]

C. *Receipt of Additional Evidence*

The trial court has discretion to reopen the evidence on an uncontested matter. The trial court automatically abuses its discretion if it reopens, postverdict, the evidence on a contested matter in a jury case, because to do so is contrary to law.[489]

D. *Newly Discovered Evidence*

To obtain a new trial based upon newly discovered evidence,[490] a movant must show:

(1) that the evidence had come to his knowledge since the trial;
(2) that it was not owing to want of due diligence that it had not come [to his attention] sooner;
(3) that it is not cumulative; and
(4) that [the new evidence] is so material that it would probably pro-

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485. TEX. R. CIV. P. 301; TEX. R. CIV. P. 324(c).

486. Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 227 (Tex. 1990); Exxon Corp. v. Quinn, 726 S.W.2d 17, 19 (Tex. 1987); Navarette v. Temple Indep. Sch. Dist., 706 S.W.2d 308, 309 (Tex. 1986); Williams v. Bennett, 610 S.W.2d 144, 145 (Tex. 1980); Lone Star Ford, Inc. v. McCormick, 838 S.W.2d 734, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied); Wal-Mart Stores, Inc. v. Berry, 833 S.W.2d 587, 590 (Tex. App.—Texarkana 1992, writ requested); Sun Power, Inc. v. Adams, 751 S.W.2d 689, 692 (Tex. App.—Fort Worth 1988, no writ).

487. *Navarette*, 706 S.W.2d at 309; *Williams*, 610 S.W.2d at 145.

488. Southern States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); *Navarette*, 706 S.W.2d at 309.

489. *See* TEX. R. CIV. P. 270 (allowing additional testimony only before jury verdict rendered).

490. TEX. R. CIV. P. 324(b)(1).

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duce a different result if a new trial were granted.[491]

Further, the newly discovered evidence must be admissible, competent evidence.[492]

Whether a motion for new trial based on the ground of newly discovered evidence will be granted or denied lies "within the sound discretion of the trial court, and its decision will not be disturbed absent a manifest abuse of discretion."[493] When a trial court refuses to grant a new trial based on newly discovered evidence, every reasonable presumption will be made to affirm the trial court's decision.[494] In reviewing the trial court's decision refusing a new trial, appellate courts recognize the well-established principle that motions for new trial based on newly discovered evidence are not favored by the courts, and are reviewed with careful scrutiny.[495]

E. *Motion for New Trial, Generally*

"A trial court has broad discretion in granting a new trial, before or after judgment."[496] In addition to the reasons stated in Texas Rule of Civil Procedure 320,[497] a trial court may, in its discretion, grant a new trial "in the interest of justice."[498] While trial courts have discretion to grant a new trial, which "they have in all cases governed by equitable principles, it is not an unbridled discretion to decide cases as they might deem proper without reference to any guiding rule or princi-

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491. Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983); Rankin v. Atwood Vacuum Mach. Co., 831 S.W.2d 463, 467 (Tex. App.—Houston [14th Dist.] 1992), *writ denied per curiam*, 841 S.W.2d 856 (Tex. 1992); Pan Am. Life Ins. Co. v. Erbauer Constr. Co., 791 S.W.2d 146, 151 (Tex. App.—Houston [1st Dist.] 1990), *rev'd on other grounds*, 805 S.W.2d 395 (Tex.), *cert. denied*, __ U.S. __, 112 S. Ct. 86, 116 L. Ed. 2d 59 (1991); Sifuentes v. Texas Employers' Ins. Ass'n, 754 S.W.2d 784, 787 (Tex. App.—Dallas 1988, no writ); Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 886 (Tex. App.—Houston [1st Dist] 1988, no writ).

492. Nguyen v. Minh Food Co., 744 S.W.2d 620, 621 (Tex. App.—Dallas 1987, writ denied).

493. *Jackson*, 660 S.W.2d at 809; *Eikenhorst*, 746 S.W.2d at 886; Southwest Inns, Ltd. v. General Elec. Co., 744 S.W.2d 258, 264 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

494. *Nguyen*, 744 S.W.2d at 622.

495. *Id.*

496. Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988, orig. proceeding); *see also* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985, orig. proceeding); Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983).

497. TEX. R. CIV. P. 320 (stating new trial granted for good cause on motion of party or court's own notion).

498. *Champion Int'l Corp.*, 762 S.W.2d at 899; *Johnson*, 700 S.W.2d at 918.

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ple."[499] The grant of a new trial is never reviewable, unless it was void because (1) jurisdiction was lacking, or (2) the order was based expressly solely on the ground of irreconcilably conflicting jury answers.[500] In either event, mandamus is available in place of traditional appellate review.[501] The standard is de novo because these are questions of law.

The denial of a motion for new trail is reviewable by appeal. The standard of review depends on the complaint preserved by the motion for new trial.[502] Sufficiency of the evidence challenges, of course, are governed by the legal and factual sufficiency standards of review.[503]

F. *Rule 324 Motion for New Trial*

A motion for new trial is not a prerequisite to appeal in either a jury or nonjury trial unless the complaint concerns matters that have not otherwise been brought to the court's attention or for which additional evidence is needed.[504] Texas Rule of Civil Procedure 324(b) requires that the following issues be raised by motion for new trial:

> (1) a complaint on which evidence must be heard, such as one for jury misconduct, newly discovered evidence, or failure to set aside a judgment by default;
> (2) a complaint of factual insufficiency of the evidence to support a jury finding;
> (3) a complaint that a jury finding is against the overwhelming weight of the evidence;
> (4) a complaint of inadequacy or excessiveness of the damages found by the jury; or
> (5) incurable jury argument if not otherwise ruled on by the trial court.[505]

The reason for requiring that these matters first be brought to the attention of the trial court is to give the trial court the opportunity to

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499. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 392-93, 133 S.W.2d 124, 126 (1939).

500. Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984); Atchison, T. & S.F.R.R. v. Brown, 750 S.W.2d 332, 333 (Tex. App.—Eastland 1988, no writ).

501. *See, e.g.*, Rogers v. Clinton, 794 S.W.2d 9, 11 (Tex. 1990) (finding mandamus proper remedy to cure judge's order made after motion for new trial withdrawn).

502. *See* TEX. R. CIV. P. 324 (presenting prerequisites for motion for new trial).

503. *See generally* Part VII, *infra*.

504. TEX. R. CIV. P. 324(b).

505. TEX. R. CIV. P. 324(b)(1)-(5).

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correct any errors that were not considered prior to the motion.[506] A trial court has wide discretion in granting a new trial, and the trial court's discretion will not be disturbed on appeal absent a showing of a manifest abuse of discretion.[507]

G. *Motion To Correct, Reform, or Modify Judgment, or Judgment Nunc Pro Tunc*

After the trial court's plenary power over its own judgment terminates and the judgment becomes final, a nunc pro tunc is appropriate only to correct clerical errors in entering the judgment.[508] However, it cannot correct judicial errors made in rendering the final judgment.[509] A judicial error is "the type of error which occurs in the rendering of the judgment as distinguished from the entering of a judgment."[510] In determining whether the trial court's attempted correction is a correction of a judicial error or a clerical error, the appellate court is "required to look to the judgment that was actually rendered and not to the judgment that should or might have been rendered."[511] The decision of whether an error in a judgment is a judicial or clerical error is a question of law that is not binding on the appellate court.[512]

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506. Stillman v. Hirsch, 128 Tex. 359, 369, 99 S.W.2d 270, 275 (1936); Mushinski v. Mushinski, 621 S.W.2d 669, 670-71 (Tex. Civ. App.—Waco 1981, no writ). The motion for new trial may be overruled by signed order or by operation of law. TEX. R. CIV. P. 329b(c); Cecil v. Smith, 804 S.W.2d 509, 511 (Tex. 1991).

507. Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988); Grissom v. Watson, 704 S.W.2d 325, 326 (Tex. 1986); Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983); Mitchell v. Bass, 26 Tex. 372, 377-78 (1862); Allied Rent-All, Inc. v. International Rental Ins., 764 S.W.2d 11, 13 (Tex. App.—Houston [14th Dist.] 1988, no writ); Fillinger v. Fuller, 746 S.W.2d 506, 508 (Tex. App.—Texarkana 1988, no writ).

508. *See* TEX. R. CIV. P. 316 (providing means of correcting clerical errors in record); *see also* Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970) (stating that judicial errors in rendition of judgment may not be corrected by nunc pro tunc judgment); Crocker v. Synpol, Inc., 732 S.W.2d 429, 436 (Tex. App.—Beaumont 1987, no writ) (noting that trial court may only correct clerical errors after rendering final judgment).

509. Escobar v. Escobar, 711 S.W.2d 230, 231-32 (Tex. 1986).

510. *Crocker*, 732 S.W.2d at 436; *e.g.*, Knox v. Long, 152 Tex. 291, 295, 257 S.W.2d 289, 291 (1953).

511. *Crocker*, 732 S.W.2d at 436; *e.g.*, Coleman v. Zapp, 105 Tex. 491, 495, 151 S.W. 1040, 1041 (1912).

512. Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968); Seago v. Bell, 764 S.W.2d 362, 364 (Tex. App.—Beaumont 1989, no writ); *Crocker*, 732 S.W.2d at 436.

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H. *Guardian Ad Litem Attorney's Fees*

When an attorney is appointed as a guardian ad litem pursuant to Texas Rule of Civil Procedure 173, he is entitled to a reasonable fee to be taxed as costs pursuant to Rules 131 and 141.[513] Generally, ad litem fees are assessed against the losing party.[514] The same factors that determine the reasonableness of attorney's fees also control an award for ad litem fees.[515] In applying those considerations, the award of guardian ad litem attorney's fees is a matter within the sound discretion of the trial court.[516] When an ad litem fee is unreasonable or excessive, the appellate court may fix the amount of the fee.[517]

I. *Remittitur*

The remittitur process arises out of the trial court's almost unbridled discretion to grant new trials.[518] Professors Powers and Ratliff correctly observe that when a trial court believes that a jury's award of damages is excessive, it can use its autonomy to force the plaintiff to make what amounts to a settlement offer.[519] In such a situation, the trial court typically denies the defendant's motion for new trial on the condition that the plaintiff remit a specified amount of damages so that the trial judge may sign a lesser judgment.[520] The plaintiff has two choices: she may remit the suggested amount unconditionally or she may have a new trial.[521] Because the trial court has no authority to change the jury's award, the trial court judge cannot compel a remittitur, but may only "suggest" it.[522] Like the trial courts, the

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513. TEX. R. CIV. P. 173; *see* Dover Elevator Co. v. Servellon, 812 S.W.2d 366, 367 (Tex. App.—Dallas 1991, no writ) (remanding case to assess guardian ad litem fees as costs pursuant to Rules 131 and 141).

514. *Dover Elevator Co.*, 812 S.W.2d at 367 (citing TEX. R. CIV. P. 131 and 141).

515. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987).

516. *Id.*

517. Hirczy v. Hirczy, 838 S.W.2d 783, 787 (Tex. App.—Corpus Christi 1992, n.w.h.); Celanese Chem. Co. v. Burleson, 821 S.W.2d 257, 262 (Tex. App.—Houston [1st Dist.] 1991, no writ).

518. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 564 (1991).

519. *Id.*

520. *Id.*

521. Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987) (holding that if plaintiff rejects "suggestion," trial court may grant new trial).

522. William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 564 (1991).

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courts of appeals "also have the power to suggest a remittitur in lieu of a new trial, whether or not the trial court has done so."[523] The court of appeals may order a remittitur if the evidence is factually insufficient to support the award, and the court of appeals's order is reviewable by the supreme court to determine if the court of appeals applied the correct legal standard.[524] Therefore, while the supreme court lacks jurisdiction to review or to order a remittitur, it does have jurisdiction to determine if the court of appeals applied the proper standard of review.[525]

In either ordering a remittitur or in reviewing a trial court's order of remittitur, the proper standard of review is factual sufficiency, not abuse of discretion.[526] The court of appeals must "examine all the evidence in the record to determine whether sufficient evidence supports the damage award and remit only if some portion is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust."[527] The courts of appeals must also comply with *Pool v. Ford Motor Co.*[528] if they either order or affirm a suggestion of a remittitur of damages.[529]

1. Actual Damages

If there is legally insufficient evidence to support an award of actual damages, a take-nothing judgment for that amount should be rendered by the trial court or the appellate court, without suggesting a remittitur.[530] When the evidentiary support for part of an actual damages award is factually insufficient, the trial court or the court of appeals should "suggest a remittitur of that part of the verdict."[531]

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523. *Id.*

524. See generally Part VII for a discussion of the factual insufficiency of the evidence standard of review.

525. Pope v. Moore, 711 S.W.2d 622, 623 (Tex. 1986).

526. *See* Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 777-78 (Tex. 1989) (applying factual sufficiency standard to attorney's fees); Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987) (applying factual sufficiency standard to actual damages); *Pope*, 711 S.W.2d at 624 (applying factual sufficiency standard to punitive damages); *see also* TEX. R. CIV. P. 315 (providing for remittitur generally); TEX. R. CIV. P. 324(b)(2) (discussing factual insufficiency to support jury findings); TEX. R. APP. P. 85 (providing for appellate review of remittitur request).

527. *Pope*, 711 S.W.2d at 624.

528. 711 S.W.2d 622 (Tex. 1986).

529. *Id.* See Part VII(B) for a discussion of *Pool*.

530. Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987).

531. *Id.* The trial judge may only "suggest" a remittitur, she may not order a remittitur.

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The party that prevailed in the trial court should then be given the option of either accepting the remittitur or having the case remanded for a new trial.[532]

a. Unliquidated Damages

The process of awarding damages for amorphous, discretionary damages, such as mental anguish and pain and suffering, is inherently difficult because the injury constitutes a subjective, unliquidated, non-pecuniary loss.[533] It is "necessarily an arbitrary process, not subject to objective analysis."[534] Because there are no objective guidelines to assess the money equivalent to such injuries, the jury is given a great deal of discretion in awarding an amount of damages it determines appropriate.[535] One court observed that once there is some amount of mental anguish—or pain and suffering—established by the evidence, the award of damages is "virtually unreviewable."[536] The court ad-

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Highlands Ins. Co. v. Baugh, 605 S.W.2d 314, 319 (Tex. Civ. App.—Eastland 1980, no writ). If the plaintiff rejects the "suggestion," the trial court may grant a new trial. *Larson*, 730 S.W.2d at 641.

532. *Larson*, 723 S.W.2d at 641; *see* TEX. R. APP. P. 85(c) (stating appellate court guidelines upon finding that trial court erred in failing to suggest remittitur).

533. Duron v. Merritt, 846 S.W.2d 23, 26 (Tex. App.—Corpus Christi 1992, n.w.h.); Texas Farmers Ins. Co. v. Soriano, 844 S.W.2d 808, 826 (Tex. App.—San Antonio 1992, writ requested); Baylor Med. Plaza Servs. Corp. v. Kidd, 834 S.W.2d 69, 78 (Tex. App.—Texarkana 1992, writ denied); Worsham Steel Co. v. Arias, 831 S.W.2d 81, 85 (Tex. App.—El Paso 1992, no writ).

534. LaCoure v. LaCoure, 820 S.W.2d 228, 234 (Tex. App.—El Paso 1991, writ denied); State Farm Mut. Auto Ins. Co. v. Zubiate, 808 S.W.2d 590, 601 (Tex. App.—El Paso 1990, writ denied); Skaggs Alpha Beta, Inc. v. Nabhan, 808 S.W.2d 198, 201 (Tex. App.—El Paso 1991, no writ); National Union Fire Ins. Co. v. Dominguez, 793 S.W.2d 66, 73 (Tex. App.—El Paso 1990, writ denied); *e.g.*, Baptist Memorial Hosp. Sys. v. Smith, 822 S.W.2d 67, 78 (Tex. App.—San Antonio 1991, writ denied); State Farm Fire & Casualty Co. v. Gros, 818 S.W.2d 908, 915 (Tex. App.—Austin 1991, no writ).

535. Hicks v. Ricardo, 834 S.W.2d 587, 591 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Kidd*, 834 S.W.2d 69, 78 (Tex. App.—Texarkana 1992, no writ); *Baptist Memorial Hosp. Sys.*, 822 S.W.2d at 78; *La Coure*, 820 S.W.2d at 234; *Zubiate*, 808 S.W.2d at 601; *see* Greater Houston Transp. Co. v. Zrubeck, No. 13-91-426-CV, 1993 WL 24002 at *20-22 (Tex. App.—Corpus Christi, Feb. 4, 1992, n.w.h.) (holding that award of discretionary damages such as mental anguish "will be shunted to the discretionary domain of the jury"); *Duron*, 846 S.W.2d at 26 (holding that it is within jury's province "to resolve the speculative matters of pain and suffering, future pain and suffering, future disfigurement, and future physical impairment" and award damages accordingly); Marshall v. Superior Heat Treating Co., 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ) (holding that damage awards for past and future physical pain, mental anguish, and physical impairment are "particularly within the province of the jury").

536. *Arias*, 831 S.W.2d at 85.

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ded that while the damages are clearly reviewable under a sufficiency of the evidence review, the court is "simply acknowledging the difficulties inherent in an appellate court's review of discretionary damages."[537] Nevertheless, a challenge to a damages award for these types of unliquidated and intangible injuries is reviewed as any other challenge based upon the sufficiency of the evidence.[538]

b. Zero Damages

The zero-damages rule provides that in cases involving unliquidated damages, the jury must award some amount of money for every element of damage proved, or the case will be reversed and remanded for a new trial.[539] Based on the zero-damages rule, some courts have concluded that once the fact of an injury is either established by the evidence or acknowledged by the jury by a finding of some resulting damages—such as medical expenses—the jury's failure to award damages for pain and suffering or some other intangible injury is regarded as against the great weight and preponderance of the evidence.[540] In contrast, other courts have upheld jury findings of no damages for intangible injuries, despite other findings and evidence of injury and some resulting damages, by simply concluding that the failure to find damages was not against the great weight and preponderance of the evidence.[541]

The zero-damages rule has been criticized as contrary to supreme

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537. *Id.* at 85 n.2

538. Larson v. Cactus Util. Co., 730 S.W.2d 640, 641 (Tex. 1987). In *Another Look at "No Evidence" and "Insufficient Evidence"*, the authors noted the difficulty in cases involving intangible damages for appellate courts to point to specific testimony that demonstrates excessiveness or inadequacy as required by *Pool*. Williams Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 567 (1991). "Nevertheless, common sense suggests that courts should have some authority to review excessive or inadequate damage awards. It would be unwise to permit a jury to make any award it thinks fit without limit, even though it is dealing with damages that resist exact calculation or quantification." *Id.*

539. Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages"*, 54 TEX. B.J. 418, 418 (1991).

540. *See, e.g.*, Blizzard v. Nationwide Mut. Fire Ins. Co., 756 S.W.2d 801, 804 (Tex. App.—Dallas 1988, no writ) (denying additional damages for pain and suffering); Hammond v. Estate of Rimmer, 643 S.W.2d 222, 224 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (awarding damages due to obvious pain and suffering); Taylor v. Head, 414 S.W.2d 542, 544 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.) (granting damages upon finding of pain and suffering); Bolen v. Timmons, 407 S.W.2d 947, 949 (Tex. Civ. App.—Amarillo 1966, no writ) (reversing trial court after arbitrarily fixing damages unsupported by evidence).

541. *Blizzard*, 756 S.W.2d at 805.

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court standards of evidentiary review and as adverse to the enforcement of those standards as required by *Pool*[542] and the rule has now been rejected by the courts.[543] Accordingly, a challenge to an award of zero damages is reviewed as any other challenge based upon the sufficiency of the evidence.[544]

2. Punitive Damages

An appellate court also reviews punitive damages for factual sufficiency in a motion for new trial.[545] When reviewing an award of punitive damages, the reviewing court must consider whether the punitive damages are "reasonably proportional to the actual damages" and "whether the defendant was justly punished under the circumstances of the case."[546] "Actual damages are used to indicate the reasonableness of punitive damages under the rule that punitive damages must be rationally related to actual damages."[547] This ratio, however, is merely a tool to assist the courts in determining when a

542. Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages"*, 54 TEX. B.J. 418, 420 (1991).

543. Pilkington v. Kornell, 822 S.W.2d 223, 225 (Tex. App.—Dallas 1991, writ denied); Schmeltekopf v. Johnson Well Serv. of Luling, 810 S.W.2d 865, 869 (Tex. App.—Austin 1991, no writ). *But cf.* Hyler v. Boytor, 823 S.W.2d 425, 427 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding that in challenge to finding of zero damages "the relevant determination . . . is whether the indicia of inquiry is more subjective than objective"); *Blizzard*, 756 S.W.2d at 805 (concluding that more evidence of outward signs of pain make it more likely that appellate court will reverse jury finding of no damages for pain and suffering).

544. D.E.W., Inc. v. Depco Forms, Inc., 827 S.W.2d 379, 383 (Tex. App.—San Antonio 1992, no writ); Marshall v. Superior Heating Treating Co., 826 S.W.2d 197, 200 (Tex. App.—Fort Worth 1992, no writ); *Pilkington*, 822 S.W.2d at 225; Elliott v. Dow, 818 S.W.2d 222, 224 (Tex. App.—Houston [14th Dist.] 1991, no writ); Paschall v. Peevey, 813 S.W.2d 710, 714-15 (Tex. App.—Austin 1991, no writ). Some authors stated the rule that has been adopted by the courts as follows:

> To require a new trial under *Pool*, however, the reviewing court must conclude, after weighing all the evidence, including the evidence in support of the $0 finding, that the element of damages was so abundantly established that the discrepancy between the evidence and the finding of zero dollars is manifestly unjust. The evidence must do more than establish a threshold level of proof that the plaintiff experience an element of damages; it must establish that element of damages so thoroughly that it would be manifestly unjust to tolerate the award of $0. The zero damages rule should be discarded because it interferes with the jury's role as a finder of fact.

Raul A. Gonzalez & Rob Gilbreath, *Appellate Review of a Jury's Finding of "Zero Damages"*, 54 TEX. B.J. 418, 420 (1991).

545. TEX. R. CIV. P. 324(b)(2); Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986).

546. Greater Houston Transp. Co. v. Zrubeck, No. 13-91-426-CV, 1993 WL 24002, at *31 (Tex. App.—Corpus Christi, Feb. 4, 1993, n.w.h.).

547. Wright v. Gifford-Hill & Co., 725 S.W.2d 712, 714 (Tex. 1987).

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punitive damages award is the product of passion on the part of the jury, rather than reason.[548] There is no exact formula by which punitive damages are measured to actual damages.[549]

Besides considering the ratio of punitive to actual damages, the appellate court may also review: "the nature of the wrong, the character of the conduct involved, the degree of the culpability of the wrongdoer, the situation and sensibilities of the parties concerned, . . . the extent to which such conduct offends a public sense of justice in propriety,"[550] and the extent to which punitive damages will punish and deter similar conduct, taking into account the financial resources of the offender.[551]

An award of punitive damages "rests in the jury's discretion and will not be set aside as excessive unless the amount is so large as to indicate that it is the result of passion and prejudice, or that the evidence has been disregarded."[552] Punitive damages do not depend upon the rules of fair compensation, but are based on the rules of just punishment.[553] Thus, "when a jury honestly attempts to assess an amount which punishes a wrongdoer, which does not oppress him, but which is great enough to cause him and others similarly situated to refrain from similar acts in the future, the judgment should not be disturbed by an appellate court."[554]

How this standard of review will be applied in light of evidence of a defendant's net worth[555] and the ability of witnesses to testify to ulti-

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548. *Id.*

549. Tatum v. Preston Carter Co., 702 S.W.2d 186, 188 (Tex. 1986); *see* InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 909 (Tex. App.—Dallas 1987, writ dism'd by agr.) (discussing "reasonable relationship test"). The ratio of actual damages to punitive damages has been substantially reversed by the Tort Reform Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon 1986 & Supp. 1992) (providing, in most cases, that exemplary damages may not exceed greater of $200,000 or four times amount of actual damages).

550. *Tatum*, 702 S.W.2d at 188; Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981).

551. Lunsford v. Morris, 746 S.W.2d 471, 471 (Tex. 1988).

552. Aetna Casualty & Sur. Co. v. Joseph, 769 S.W.2d 603, 607 (Tex. App.—Dallas 1989, no writ); *see* Wal-Mart Stores, Inc. v. Berry, 833 S.W.2d 587, 595 (Tex. App.—Texarkana 1992, no writ) (holding that punitive damages award may not be oppressive).

553. *Joseph*, 769 S.W.2d at 608.

554. *Id.* (citing Southwestern Inv. Co. v. Neeley, 443 S.W.2d 573, 580 (Tex. Civ. App.—Fort Worth 1969), *rev'd on other grounds*, 452 S.W.2d 705 (Tex. 1970)).

555. *Lunsford*, 746 S.W.2d at 473. In one case, the court reduced a $15,000,000 punitive damages award to $660,000 and stated, "The Courts today are faced with a real dilemma: Is the evidence factually sufficient to support the trial court's judgment upholding the jury award of $15 million in punitive damages against Appellant? Our answer is no, but why? *Because it*

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mate issues[556] remains to be settled. Also, the constitutional challenges to punitive damages, whether requiring clear and convincing evidence or applying other meaningful standards, will surely affect this standard of review.[557]

3. Attorney's Fees

An award of attorney's fees must be based upon some statutory[558] or contractual authority.[559] Attorney's fees may not be recovered in tort cases.[560] In reviewing the reasonableness of an award of attorney's fees, which may include a legal assistant's time under certain conditions,[561] the reviewing court should consider the time and labor involved, the nature and complexities of the case, the value of the interest involved, the extent of the responsibilities assumed by the at-

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just is." State Farm Mut. Auto Ins. Co. v. Zubiate, 808 S.W.2d 590, 605 (Tex. App.—El Paso 1991, writ denied).

556. Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 365 (Tex. 1987).

557. *See* General Chem. Corp. v. De La Lastra, 815 S.W.2d 750 (Tex. App.—Corpus Christi 1991), *writ granted*, 35 Tex. Sup. Ct. J. 508, 509 (Feb. 26, 1992) (granting writ to consider whether present Texas system and practice with respect to exemplary damages denied defendant due process rights guaranteed by United States and Texas Constitutions); Transportation Ins. Co. v. Moriel, 814 S.W.2d 144 (Tex. App.—El Paso 1991), *writ granted*, 35 Tex. Sup. Ct. J. 204, 204 (Dec. 11, 1991) (considering whether system denied defendant due process rights); *see also* TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va. 1992), *cert. granted*, __ U.S. __, __ 113 S. Ct. 594, 594, 121 L. Ed. 2d 532, 533 (1992) (granting certiorari to determine whether award of punitive damages against defendant in absence of procedural safeguards approved in *Pacific Mutual Insurance Co. v. Haslip*, __ U.S. __, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), violated defendant's procedural due process rights and whether excessive and disproportionate punitive damage award violated defendant's substantive due process rights). In one case, the West Virginia Supreme Court concluded that post-*Haslip* decisions fell into three categories: (1) really stupid defendants; (2) really mean defendants; and (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm. *TXO Prod. Co.*, 419 S.E.2d at 887-88.

558. *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1986) (providing for award of attorney's fees in declaratory judgment actions); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(1)-(8) (Vernon 1986) (providing for award of attorney's fees if claim is for rendered services, performed labor, furnished material, freight or express overcharges, lost or damaged freight or express, killed or injured stock, sworn account, or oral or written contract). An award of attorney's fees in a declaratory judgment action is within the discretion of the trial court. International Ins. Co. v. Dresser Indus., Inc., 841 S.W.2d 437, 447 (Tex. App.—Dallas 1992, writ denied) (citing Oake v. Collin County, 692 S.W.2d 454, 455 (Tex. 1985)).

559. Southern Concrete Co. v. Metrotec Fin., Inc., 775 S.W.2d 446, 449 (Tex. App.—Dallas 1989, no writ).

560. Knebel v. Capital Nat'l Bank, 518 S.W.2d 795, 803-04 (Tex. 1974).

561. Gill Sav. Ass'n v. International Supply Co., 759 S.W.2d 697, 702-05 (Tex. App.—Dallas 1988, writ denied) (identifying factors for including legal assistant's time in attorney's fee award).

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torney, the benefits resulting to the client from the attorney's services,[562] other employment lost by the attorney because of the undertaking, the contingency or certainty of compensation, whether the employment is casual or for an established and regular client,[563] and whether the fee would be reasonable for a litigant to pay his attorney.[564] A "short hand version of these considerations is that the trial court may award those fees that are 'reasonable and necessary' for the prosecution of the suit."[565]

To determine whether an attorney's fee award is excessive, "the reviewing court may draw upon the common knowledge of the justices of the court and their experiences as lawyers and judges."[566] When multiple causes of action or multiple parties are involved, the party who asserts the causes must separate those hours for which fees may be recovered from those hours for which fees cannot be recovered, and must indicate from which party the fees may be recovered.[567] An exception to the duty to segregate exists when the attorney's fees are rendered in connection with claims that arise out of the same transaction and that are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts.[568] Moreover, a trial court may not grant an unconditional award of appellate attorney's fees; such an award must be conditioned upon the appellant's unsuccessful appeal.[569]

The appropriate standard of review of an award of attorney's fees or a trial court's order of remittitur on attorney's fees is sufficiency of the evidence.[570] Therefore, the trial court's remittitur will be affirmed (or suggested by the court of appeals) "when the evidence is factually

562. Smith v. Renz, 840 S.W.2d 702, 705 (Tex. App.—Corpus Christi 1992, writ denied).

563. City of Fort Worth v. Groves, 746 S.W.2d 907, 918 (Tex. App.—Fort Worth 1988, no writ).

564. Argonaut Ins. Co. v. ABC Steel Prods. Co., 582 S.W.2d 883, 889 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.).

565. Stewart Title Guaranty Co. v. Sterling, 822 S.W.2d 1, 10 (Tex. 1991).

566. *Groves*, 746 S.W.2d at 918; *Argonaut Ins. Co.*, 582 S.W.2d at 889.

567. *Stewart Title Guaranty Co.*, 822 S.W.2d at 10-11; *Southern Concrete Co.*, 775 S.W.2d at 449; Bullock v. Kehoe, 678 S.W.2d 558, 560 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

568. *Stewart Title*, 822 S.W.2d at 11.

569. *See* Rittgers v. Rittgers, 802 S.W.2d 109, 115 (Tex. App.—Corpus Christi 1990, writ denied) (noting that party may not be penalized for taking successful appeal by taxing him with attorney's fees).

570. *Stewart Title*, 822 S.W.2d at 12; Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777, 777-78 (Tex. 1989) (per curiam); Larson v. Cactus Util. Co., 730 S.W.2d 640, 641

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insufficient to support the verdict."[571]

J. *Court Costs*

Under Texas Rule of Civil Procedure 131,[572] "the successful party in a suit is entitled to recover from his adversary all costs incurred in the suit, except where otherwise provided."[573] Pursuant to Rule 141, the trial court may assess the costs, other than as provided by law or the rules, for good cause stated on the record.[574] "Good cause" is an "elusive concept" to be determined on a case-by-case basis.[575] The trial court's determination of good cause and its assessment of court costs is reviewed for an abuse of discretion.[576]

K. *Exercise of Plenary Power*

A trial court has plenary power over its judgement until it becomes final.[577] Once a trial court loses plenary power over its judgment, the judgment becomes final and any attempt to exercise further jurisdiction over the judgment, except to correct clerical errors, will be set aside as void.[578]

(Tex. 1987). See generally Part VII and VIII for a discussion of challenges to the sufficiency of the evidence of jury and nonjury findings.

571. *Snoke*, 770 S.W.2d at 778.

572. TEX. R. CIV. P. 131.

573. *Id.*; Rogers v. Walmart Stores, Inc., 686 S.W.2d 599, 601 (Tex. 1985); Contemporary Health Management, Inc. v. Palacios, 832 S.W.2d 743, 745 (Tex. App.—Houston [14th Dist.] 1992, no writ).

574. TEX. R. CIV. P. 141

575. *See Rogers*, 686 S.W.2d at 601 (lengthening of trial unnecessarily is sufficient good cause to assess costs against successful defendant); Gleason v. Lawson, No. 13-91-523-CV, 1993 WL 55229, at *8 (Tex. App.—Corpus Christi, Mar. 5, 1993, n.w.h.) (stating that Rules 131 and 141 should not be used to penalize party for refusal to enter into settlement negotiations when party has not been ordered or encouraged to do so).

576. State v. Castle Hills Forest, Inc., 842 S.W.2d 370, 372 (Tex. App.—San Antonio 1992, n.w.h.); State v. Brown, 802 S.W.2d 898, 900 (Tex App.—San Antonio 1991, no writ); San Antonio Housing Auth. v. Underwood, 782 S.W.2d 25, 27 (Tex. App.—San Antonio 1989, no writ); *see* Scholl v. Home Owners Warranty Corp., 810 S.W.2d 464, 468 (Tex. App.—San Antonio 1991, no writ) (holding it abuse of discretion to allocate costs contrary to Rule 131 without including in record explanation of allotment as required by Rule 141).

577. Fruehauf Corp. v. Carillo, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam) (citing Mathes v. Kelton, 569 S.W.2d 876, 878 (Tex. 1978); TransAmerican Leasing Co. v. Three Bears, Inc., 567 S.W.2d 799, 800 (Tex. 1978)).

578. *See* Graham Nat'l Bank v. Fifth Court of Appeals, 747 S.W.2d 370, 370 (Tex. 1987) (rendering trial court order void because plenary power expired); Times Herald Printing Co. v. Jones, 730 S.W.2d 648, 649 (Tex. 1987) (finding trial court had no jurisdiction to consider motion to unseal because plenary power lost).

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L. *Supersedeas Bond*

Generally, if a party loses at the trial court, a writ of supersedeas will stay execution of the judgment pending appeal and will guarantee the appellee the benefits of his judgment if affirmed.[579] To obtain a writ of supersedeas, a party deposits with the clerk a "good and sufficient" supersedeas bond or deposit.[580] In cases when the judgment is for other money, property, or foreclosure, the decision of whether and under what circumstances to permit supersedeas lies within the discretion of the trial or appellate court.[581]

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579. *See* Edlund v. Bounds, 842 S.W.2d 719, 732 (Tex. App.—Dallas 1992, writ denied) (discussing purpose of supersedeas bond); Cooper v. Bowser, 583 S.W.2d 805, 807 (Tex. Civ. App.—Dallas 1992, no writ) (noting what amount of supersedeas bond is acceptable and acceptable alternative).

580. TEX. R. APP. P. 47(a). A few judgments are stayed without the requirement of posting a supersedeas bond or deposit. Specifically, those exempt from filing a bond include: the State Bar of Texas, any county in Texas, any state department, any state department head, water districts and the like. TEX. CIV. PRAC. & REM. CODE ANN. § 6.001-.003 (Vernon 1986 & Supp. 1993); TEX. HEALTH & SAFETY CODE ANN. § 12.003 (Vernon 1992); TEX. PROP. CODE ANN. §§ 21.011-.16 (Vernon 1984); TEX. PROB. CODE ANN. § 29 (Vernon 1980) (executors, administrators, or guardians in their fiduciary capacity); TEX. CIV. PRAC. & REM. CODE ANN. §§ 6.001-.002 (Vernon 1986 & Supp. 1993) (incorporated cities and towns); TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon 1986 & Supp. 1993) (Veteran's Administration, any national mortgage association, any national mortgage savings and loan insurance incorporation created as national relief organization). Exempt entities supersede the judgment by filing a notice of appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon 1986 & Supp. 1993); Ammex Warehouse Co. v. Archer, 381 S.W.2d 478, 481-82 (Tex. 1964); Weber v. Walker, 591 S.W.2d 559, 562 (Tex. Civ. App.—Dallas 1979, no writ).

581. TEX. R. APP. P. 47. Texas Rule of Appellate Procedure 47 sets forth the applicable rules for superseding a judgment involving money, land or property, foreclosure on real estate, foreclosure on personal property, other judgments, conservatorship or custody, the state and municipality, a state agency, or a subdivision of the state in its governmental capacity. TEX. R. APP. P. 47(b)-(h). Section 52.002 of the Texas Civil Practice and Remedies Code provides that a trial court may set the security for less than the amount of the judgment, interests, and costs in a money judgment (other than in a bond forfeiture proceeding), "a personal injury or wrongful death action, a claim covered by liability insurance, or a workers' compensation claim," if, after notice and a hearing, the trial court finds that complete security "would cause irreparable harm to the judgment debtor" and that less than complete security "would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies." TEX. CIV. PRAC. & REM. CODE ANN. § 52.001(1)(2) (Vernon 1986 & Supp. 1993). To the extent Chapter 52 of the Texas Civil Practice and Remedies Code conflicts with the Texas Rules of Appellate Procedure, Chapter 52 controls. TEX. CIV. PRAC. & REM. CODE ANN. § 52.005 (Vernon Supp. 1993). Under Rule 47(f), an appellant may supersede execution on a judgment for other than money or the recovery of property or foreclosure by filing a bond in the amount fixed "by the trial court as will secure the judgment creditor for any loss or damage occasioned by the appeal." TEX. R. APP. P. 47(f). However, the trial court has discretion to "decline to permit the judgment to be suspended on filing by the judgment creditor of security to be ordered by

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The numerous rules for posting an appropriate supersedeas bond depend upon the type of judgment and are beyond the scope of this Article.[582] Unless the decision of whether to allow a supersedeas bond is committed to the trial court's discretion, the right to supersedeas is absolute and enforceable by mandamus, even though the trial court may retain discretion in fixing the amount of the bond.[583]

Texas Rule of Appellate Procedure 43(b) governs the suspension of interlocutory orders pending review by the appellate courts. Under this rule, the trial court may suspend an interlocutory order pending an appeal if the appellant files a supersedeas bond or makes a deposit pursuant to Texas Rule of Appellate Procedure 47.[584] Denial of supersedeas "may be reviewed for abuse of discretion on motion by the appellate court."[585] Similarly, an appellate court may issue any necessary temporary orders to preserve the rights of the party until disposition of the appeal and may require such security as it deems appropriate. However, if the appellant's right may be adequately protected by supersedeas, then the appellate court may not suspend the trial court's order.[586]

If the trial court improperly sets the amount of the bond or the clerk improperly approves it, or if it is believed an initially sufficient bond has become insufficient, the remedy is by motion in the court of appeals once appellate jurisdiction has attached.[587] If a party con-

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the trial court in such an amount as will secure the judgment debtor in any loss or damage caused by any relief granted if it is determined on final disposition that such relief was improper." *Id.* "The rule was intended to permit a trial court to deny supersedeas of an injunction, conditioned upon the setting of a bond sufficient to protect the appealing party's interests." Klein Indep. Sch. Dist. v. Fourteenth Court of Appeals, 720 S.W.2d 87, 88 (Tex. 1986). The trial court's decision is reviewed under an abuse discretion standard. *Id.*

582. *See* Roger Townsend & Sarah B. Duncan, *Stay of Judgments, in* STATE BAR OF TEXAS PROF. DEV. PROGRAM, 1 ADVANCED APPELLATE PRACTICE COURSE M (1987) (discussing rules for posting supersedeas bonds).

583. State Bar of Tex. v. Heard, 603 S.W.2d 829, 832-33 (Tex. 1980); Man-Gas Transmission v. Osborne Oil, 693 S.W.2d 576, 577 (Tex. App.—San Antonio 1985, no writ); Continental Oil Co. v. Lesher, 500 S.W.2d 183, 185 (Tex. Civ. App.—Houston [1st Dist.] 1973, orig. proceeding [leave denied]); Jennings v. Berry, 153 S.W.2d 725, 726-27 (Tex. Civ. App.—Texarkana 1941, no writ).

584. TEX. R. APP. P. 43(b).

585. *Id*; Reyes v. Atkins, 619 S.W.2d 26, 27 (Tex. App.—Fort Worth 1981, no writ).

586. TEX. R. APP. P. 43(c).

587. TEX. R. APP. P. 49; TEX. CIV. PRAC. & REM. CODE ANN. § 52.003 (Vernon Supp. 1993); Culbertson v. Brodsky, 775 S.W.2d 451, 452 (Tex. App.—Fort Worth 1989, writ dism'd w.o.j.); Bank of E. Tex. v. Jones, 758 S.W.2d 293, 294 (Tex. App.—Tyler 1988, orig. proceeding [leave denied]).

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tends that the trial court's order setting the amount of the bond is excessive, the party may have the trial court's order reviewed by motion in the court of appeals.[588] Upon review of the amount of the bond, if the appellate court finds that the bond is insufficient, the court "shall" require an additional bond;[589] however, upon finding the bond excessive, the court "may" reduce the amount of the original bond.[590]

Texas Rule of Appellate Procedure 47(k) gives the trial court continuing jurisdiction, even beyond the expiration of its plenary power and perfection of the appeal, to monitor and modify the security.[591] Any changes ordered by the trial court, however, must be communicated to the court of appeals.[592] The review of and changes to security remain also with the appellate court.[593] Thus, in carrying out that review, the appellate court can issue any necessary temporary orders, or remand the matter to the trial court for evidentiary determinations.[594]

M. *Turnover Orders*

Under the turnover statute,[595] the trial court has the discretion "to aid a diligent judgment creditor to reach certain types of property of a judgment debtor."[596] The trial court's decision to grant or deny a turnover order is reviewed under an abuse of discretion standard.[597]

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588. TEX. R. APP. P. 49; TEX. CIV. PRAC. & REM. CODE ANN. § 52.004 (Vernon Supp. 1993). The district clerk's determination of the sufficiency or insufficiency of the tendered supersedeas bond is reviewed only upon a showing of an abuse of discretion. Universal Transp. & Distrib. Co. v. Cantu, 75 S.W.2d 697, 698 (Tex. Civ. App.—San Antonio 1934, orig. proceeding [leave denied]).

589. TEX. R. APP. P. 49(a); Gullo-Haas Toyota, Inc. v. Davidson, Eagleson & Co., 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ).

590. TEX. R. APP. P. 49(b).

591. TEX. R. APP. P. 47(k); *Gullo-Haas Toyota, Inc.*, 832 S.W.2d at 419.

592. TEX. R. APP. P. 47(k).

593. *Id.*

594. TEX. R. APP. P. 49(b); *see Culbertson*, 775 S.W.2d at 455 (setting aside order of trial court regarding amount of supersedeas and remanding to trial court with instructions to conduct hearing and consider evidence relating to sufficiency of supersedeas bond).

595. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 1986 & Supp. 1993).

596. Criswell v. Ginsberg & Foreman, 843 S.W.2d 304, 306 (Tex. App.—Dallas 1992, n.w.h.).

597. Beaumont Bank, N.A. v. Buller, 806 S.W.2d 223, 226 (Tex. 1991); Associated Ready Mix, Inc. v. Douglas, 843 S.W.2d 758, 761 (Tex. App.—Waco 1992, orig. proceeding); *Criswell*, 843 S.W.2d at 306.

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VII. CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE IN JURY TRIALS

When an appellant challenges both the legal and factual sufficiency of the evidence supporting a jury's finding, the appellate court should first review the legal sufficiency challenge.[598]

A. *Legal Insufficiency*

In a jury trial, challenges to the legal sufficiency of the evidence are preserved by:

(1) a motion for instructed verdict;
(2) a motion for judgment notwithstanding the verdict;
(3) an objection to the submission of the issue to the jury;
(4) a motion to disregard the jury's answer to a vital fact issue; or
(5) a motion for new trial specifically raising the complaint.[599]

"Legal sufficiency points of error assert a complete lack of evidence on an issue,"[600] and are designated as "no evidence" points, or "matter of law" points, depending upon whether the complaining party had the burden of proof.[601] Challenges to the legal sufficiency of the evidence points of error:

> must and may only be sustained when the record discloses: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; and (4) the evidence established conclusively the opposite of a vital fact.[602]

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598. Glover v. Texas Gen. Indem. Co., 619 S.W.2d 400, 401 (Tex. 1981).

599. T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 220 (Tex. 1992); Cecil v. Smith, 804 S.W.2d 509, 510-11 (Tex. 1991); Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 822 (Tex. 1985); Pipgras v. Hart, 832 S.W.2d 360, 367 (Tex. App.—Fort Worth 1992, writ denied); Salinas v. Fort Worth Cab & Baggage Co., 725 S.W.2d 701, 704 (Tex. 1987); Tribble & Stephens Co. v. Consolidated Servs., Inc., 744 S.W.2d 945, 947 (Tex. App.—San Antonio 1987, writ denied); *see* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362 (1960) (listing challenges to legal sufficiency).

600. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

601. *Id.*

602. Juliette Fowler Homes, Inc. v. Welch Assoc., Inc., 793 S.W.2d 660, 666 n.9 (Tex. 1990) (citing with approval, for first time, Chief Justice Calvert's formulation in Robert W. Calvert's, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)); *e.g.*, TEX. R. APP. P. 74(d); Caskey v. Bradley, 773 S.W.2d 735, 739 (Tex. App.—Fort Worth 1989, no writ); Otis Elevator Co. v. Joseph, 749 S.W.2d 920, 923 (Tex.

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1. No Evidence

If an appellant is attacking the legal sufficiency of an adverse finding of an issue on which she did not have the burden of proof, she must demonstrate on appeal that there is no evidence to support the adverse finding.[603] In reviewing "no evidence" points, the reviewing court[604] considers only the evidence and inferences that tend to support the finding, and disregards all evidence and inferences to the contrary.[605] If there is any evidence of probative force to support the finding, the point must be overruled and the finding upheld.[606] Accordingly, if there is more than a scintilla of evidence to support the finding, the no evidence challenge fails.[607]

App.—Houston [1st Dist.] 1988, no writ); Commonwealth Lloyd's Ins. Co. v. Thomas, 678 S.W.2d 278, 288 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

603. *See* TEX. R. APP. P. 74(d) (stating requisites for points of error); *see* Croucher v. Croucher, 660 S.W.2d 55, 58 (Tex. 1983) (explaining that it is appropriate for party without burden of proof to complain of no evidence to support jury finding); Hickey v. Couchman, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied) (stating that party without burden of proof challenges insufficiency of evidence); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied) (explaining appropriate challenges to sufficiency of jury findings). *See generally* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 364-68 (1960) (discussing requirements necessary to prove legal insufficiency).

604. The courts of appeals and the supreme court have jurisdiction to review challenges to the legal sufficiency of the evidence. Choate v. San Antonio & A.P. Ry., 91 Tex. 406, 409, 44 S.W.2d 69, 72 (1898).

605. Weirich v. Weirich, 833 S.W.2d 942, 945 (Tex. 1992); Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 459 (Tex. 1992); State v. $11,014.00, 820 S.W.2d 783, 784 (Tex. 1991) (per curiam); Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 227 (Tex. 1990); Lewelling v. Lewelling, 796 S.W.2d 164, 166 (Tex. 1990); Best v. Ryan Auto Group, Inc., 786 S.W.2d 670, 671 (Tex. 1990); Responsive Terminal Sys., Inc. v. Boy Scouts of Am., 774 S.W.2d 666, 668 (Tex. 1989); Southern States Transp., Inc. v. State, 774 S.W.2d 639, 640 (Tex. 1989); Sherman v. First Nat'l Bank, 760 S.W.2d 240, 242 (Tex. 1988); Davis v. City of San Antonio, 752 S.W.2d 518, 522 (Tex. 1988); Jacobs v. Danny Darby Real Estate, 758 S.W.2d 174, 175-76 (Tex. 1988); Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 765 (Tex. 1987); Stafford v. Stafford, 726 S.W.2d 14, 16 (Tex. 1987); Alm v. Aluminum Co. of Am., 717 S.W.2d 588, 593 (Tex. 1986); Larson v. Cook Consultants, Inc., 690 S.W.2d 567, 568 (Tex. 1985); King v. Bauer, 688 S.W.2d 845, 846 (Tex. 1985); Tomlinson v. Jones, 677 S.W.2d 490, 492 (Tex. 1984); Roark v. Allen, 633 S.W.2d 804, 809 (Tex. 1982); Glover v. Texas Gen. Indem. Co., 619 S.W.2d 400, 401 (Tex. 1981); McClure v. Allied Stores, 609 S.W.2d 901, 904 (Tex. 1980); Ray v. Farmers' State Bank, 576 S.W.2d 607, 609 (Tex. 1978); Garza v. Alviar, 295 S.W.2d 821, 923 (Tex. 1965); Benoit v. Wilson, 150 Tex. 273, 280-81, 239 S.W.2d 792, 796 (1951).

606. *Southern States*, 774 S.W.2d at 640; *In re* King's Estate, 150 Tex. 662, 664, 244 S.W.2d 660, 661 (1951). In one case, the supreme court even considered overruling a legal insufficiency challenge that was raised posttrial. *See Weirich*, 833 S.W.2d at 946 (considering telephone records discovered after trial).

607. *Stafford*, 726 S.W.2d at 16.

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What is a "scintilla" of evidence? "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."[608] The application of this rule provides that "if reasonable minds cannot differ from the conclusion that the evidence offered to support the existence of a vital fact lacks probative force," then it is the legal equivalent of no evidence.[609] In any other situation, the appellate court may not second guess the fact finder, unless only one inference may be drawn from the evidence.[610] Whether other possible inferences may be drawn from the evidence is not a relevant inquiry.[611] However, when the evidence furnishes a rational basis for reasonable minds to reach differing conclusions as to the existence of the crucial fact, it amounts to more than a scintilla of evidence and the no evidence challenge should be overruled.[612]

Any ultimate fact may be provided by circumstantial evidence.[613] However, under a "no evidence" review, inference stacking is not permissible. "[A] vital fact may not be established by piling inference upon inference."[614] Moreover, the legal equivalent of no evidence exists when "meager circumstantial evidence" gives rise to inferences equally consistent with two different propositions.[615] The Texas Supreme Court, in *$56,700 in U.S. Currency v. State*,[616] held that

608. Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983); Seideneck v. Cal Bayreuther Assoc., 451 S.W.2d 752, 755 (Tex. 1970); Joske v. Irvine, 91 Tex. 574, 581-82, 44 S.W. 1059, 1062 (1898).

609. *Kindred*, 650 S.W.2d at 63.

610. *$11,014.00*, 820 S.W.2d at 785 (citing Ross v. Green, 135 Tex. 103, 118, 139 S.W.2d 565, 572 (1940)).

611. *Havner*, 825 S.W.2d at 459.

612. *Id.*; *Kindred*, 650 S.W.2d at 63.

613. *$11,014.00*, 820 S.W.2d at 785; Farley v. M.M. Cattle Co., 529 S.W.2d 751, 755 (Tex. 1975); Prudential Ins. Co. of Am. v. Krayer, 366 S.W.2d 779, 780 (Tex. 1963); Dallas County Flood Control Dist. No. 1 v. Cross, 815 S.W.2d 271, 279 (Tex. App.—Dallas 1991, writ denied). A fact is established by circumstantial evidence when the fact may be fairly and reasonably drawn from other facts proved in the case. *Cross*, 815 S.W.2d at 279-80.

614. Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 858 (Tex. 1968); Texas Sling Co. v. Emanuel, 431 S.W.2d 538, 541 (Tex. 1968); *see* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 365 (1960) (citing Rounsaville v. Bullard, 154 Tex. 260, 265, 276 S.W.2d 791, 794 (1955); Lobley v. Gilbert, 149 Tex. 493, 497, 236 S.W.2d 121, 123 (1951)) (concluding that vital fact may not be established "by piling inference upon inference").

615. $56,700 in U.S. Currency v. State, 730 S.W.2d 659, 662 (Tex. 1987).

616. 730 S.W.2d 659 (Tex. 1987).

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"when circumstances are consistent with either of two facts and nothing shows that one is more probable than the other, neither fact can be inferred."[617] When an appellate court is faced with only two equally plausible opposing inferences, it must find "no evidence" to support the jury's finding of fact. Nevertheless, the reasonableness of the inferences that could be drawn must be evaluated in light of all facts and circumstances.[618]

2. As a Matter of Law

If an appellant is attacking the legal sufficiency of an adverse finding on an issue on which he had the burden of proof, he must demonstrate on appeal that the evidence conclusively established all vital facts in support of the issue.[619] In reviewing a "matter of law" challenge, the reviewing court employs a two-prong test. The court will first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary.[620] If there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law.[621] If the contrary proposition is established conclusively by the evidence, the point of error will be sustained.[622]

Texas courts have repeatedly held that although a jury is the finder

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617. *Id.* at 662; *see also* Litton Indus. Prod., Inc. v. Gammage, 668 S.W.2d 319, 324 (1984) (noting that inference may not be drawn when facts give rise to opposing inferences that are equally reasonable and plausible); Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 365 (1960) (stating that vital facts may not be inferred from meager facts).

618. *See Simmons & Simmons Constr. Co.*, 155 Tex. 353, 359, 286 S.W.2d 415, 419 (Tex. 1955) (stating that even under "no evidence" standard of review, court must consider not only facts and circumstances giving rise to inference, but also "facts and circumstances in derogation of that inference"); Texas & N.O.R. Co. v. Burden, 146 Tex. 109, 123, 203 S.W.2d 522, 530 (1947) (evaluating facts and circumstances from which inference drawn).

619. Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989); Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982); Hickey v. Couchman, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied); Smith v. Central Freight Lines, Inc., 774 S.W.2d 411, 412 (Tex. App.—Houston [14th Dist.] 1989, writ denied); Ritchey v. Crawford, 734 S.W.2d 85, 86 (Tex. App.—Houston [1st Dist.] 1987, no writ).

620. *Sterner*, 767 S.W.2d at 690; *Holley*, 629 S.W.2d at 696.

621. *Sterner*, 767 S.W.2d at 690; *Holley*, 629 S.W.2d at 696-97; Texas & N.O.R. Co. v. Burden, 146 Tex. 109, 123, 203 S.W.2d 522, 530 (1947); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied).

622. Meyerland Community Improvement Ass'n v. Temple, 700 S.W.2d 263, 267 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

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of fact, a jury may not disregard uncontroverted evidence.[623] Similarly, the appellate court must consider undisputed or uncontradicted evidence and does not have "the right to disregard the undisputed evidence and decide such issue in accordance with [its] wishes."[624]

Nevertheless, contradictory cases also hold that a jury's failure to find a fact need not be supported by any evidence, since the jury is free to disbelieve the witnesses of the party bearing the burden of proof.[625] The two lines of cases are impossible to reconcile. Given the *scope* of review, which requires the court to disregard all evidence contrary to the verdict, the latter line of cases is clearly correct when the appellant raises a "matter of law" challenge.

B. *Factual Insufficiency*

In a jury trial, a complaint that the evidence is factually insufficient to support a jury finding must be raised in a motion for new trial.[626] A motion for new trial, however, is not required in a nonjury case to challenge the legal or factual sufficiency of the evidence.[627] When reviewing a challenge to the factual sufficiency of the evidence, the court of appeals must consider all of the evidence.[628] "Factual sufficiency points of error concede conflicting evidence on an issue, yet maintain

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623. Kennedy v. Missouri Pac. Ry., 778 S.W.2d 552, 557 (Tex. App.—Beaumont 1989, writ denied); Ralston Purina Co. v. Barkley Feed & Seed Co., 722 S.W.2d 431, 434 (Tex. App.—Houston [1st Dist.] 1986), *rev'd on other grounds sub nom.* Int'l Proteins Corp. v. Ralston Purina Co., 744 S.W.2d 932 (Tex. 1988); Berry v. Griffin, 531 S.W.2d 394, 396 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

624. *Burden*, 146 Tex. at 123, 203 S.W.2d at 530; *see* Nichols v. Nichols, 727 S.W.2d 303, 305 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.) (noting that appellate court reviews evidence in light most favorable to appellant and disregards contrary inferences); Watts v. St. Mary's Hall, Inc., 662 S.W.2d 55, 59 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (disregarding contradictory evidence favorable to movant and considering uncontradicted evidence favorable to movant); *see also* Cochran v. Wool Growers Cent. Storage Co., 140 Tex. 184, 190, 166 S.W.2d 904, 908 (1942) (stating that "where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law").

625. *See* Yap v. ANR Freight Sys., Inc., 789 S.W.2d 424, 425 (Tex. App.—Houston [1st Dist.] 1990, no writ) (upholding jury finding despite charge that finding was not supported by evidence).

626. TEX. R. CIV. P. 324(b)(2), (3); TEX. R. APP. P. 52(d).

627. TEX. R. CIV. P. 324(b); Farmer's Mut. Protective Ass'n v. Wright, 702 S.W.2d 295, 296-97 (Tex. App.—Eastland 1985, no writ).

628. Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989); Lofton v. Texas Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986).

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that the evidence against the jury's finding is so great as to make the finding erroneous."[629] Factual sufficiency points of error are designated as "insufficient evidence" points or "great weight and preponderance of evidence" points, again depending upon whether the complaining party had the burden of proof.[630] Although both points are classified generally as "insufficient evidence" points, they are distinct.[631]

In *Pool v. Ford Motor Co.*,[632] the Texas Supreme Court held that when an appellate court reverses a case on the ground of factual insufficiency, the appellate court must "detail the evidence relevant to the issue in consideration, . . . clearly state why the jury's finding is factually insufficient or . . . against the great weight and preponderance of the evidence, [and] state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict."[633] Unfortunately, the *Pool* requirement does not extend to *affirmances* by the court of appeals when there has been a factual sufficiency or great weight challenge. The *Pool* requirement should be extended to those situations. At a minimum, due process mandates that a court of appeals mention some evidence that it believes is sufficient to support the jury's verdict. The courts should not be permitted to conclude simply that it has reviewed the evidence and finds it sufficient to support the jury's finding.[634]

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629. Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

630. *Id*; *see also* Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 770 n.2 (Tex. 1987) (Robertson, J., dissenting, joined by Ray & Mauzy, JJ.) (noting use of terms as legal labels).

631. Ritchey v. Crawford, 734 S.W.2d 85, 86 n.1 (Tex. App.—Houston [1st Dist.] 1987, no writ) (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 366 (1960)). An "insufficient evidence" point simply asserts that the "evidence adduced to support the vital fact, even if it is the only evidence adduced on an issue, is factually too weak to support it." *Id.* A "great weight" point simply asserts that the evidence in support of a finding of the existence of a vital fact in response to a jury's affirmative finding is insufficient because the great preponderance of the evidence supports its nonexistence. *Id.* The Calvert article does not fully discuss the problem of challenging a negative finding on an issue. *Id. Contra* Blonstein v. Blonstein, 831 S.W.2d 468, 473 (Tex. App.—Houston [14th Dist.]), *writ denied per curiam*, 36 Tex. Sup. Ct. J. 436 (Dec. 31, 1992) (stating that standard of review is same for factual insufficiency challenges regardless of burden of proof and whether court is reviewing affirmative or negative finding).

632. 715 S.W.2d 629 (Tex. 1986).

633. *Pool*, 715 S.W.2d at 635; *e.g.*, *Lofton*, 777 S.W.2d at 385.

634. *See generally* TEX. R. APP. P. 20 (requiring courts of appeals to write opinions for their decisions).

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1. Insufficient Evidence

If a party is attacking the factual sufficiency of an adverse finding on an issue to which she did not have the burden of proof, she must demonstrate that there is insufficient evidence to support the adverse finding.[635] In reviewing an insufficiency of the evidence challenge, the court of appeals[636] must first consider, weigh, and examine all of the evidence that supports and that is contrary to the jury's determination.[637] Having done so, the court should set aside the verdict only if the evidence standing alone is so weak as to be clearly wrong and manifestly unjust.[638]

2. Great Weight and Preponderance

If a party is attacking a jury finding concerning an issue upon which he had the burden of proof, he must demonstrate that the adverse finding is against the great weight and preponderance of the evidence.[639] In reviewing a challenge that the jury finding is against the great weight and preponderance of the evidence, the court of appeals must examine the entire record to determine if there is some evidence to support the finding, if the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or if the great preponderance of the evidence

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635. *See* Hickey v. Couchman, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied) (must claim insufficient evidence); Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 275-76 (Tex. App.—Amarillo 1988, writ denied) (must claim insufficient evidence or no evidence).

636. A court of appeals has conclusive jurisdiction over questions of fact. TEX. CONST. art. V, § 6; Coulson v. Lake LBJ Util. Dist., 781 S.W.2d 594, 597 (Tex. 1989); *see* Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 648-49 (Tex. 1988) (noting that appellate court may review questions of fact); Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988) (explaining that appellate review of factual sufficiency points is conclusive).

637. Plas-Tex, Inc. v. United States Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989); Sosa v. City of Balch Springs, 772 S.W.2d 71, 72 (Tex. 1989); Lofton v. Texas Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986); Harco Nat'l Ins. Co. v. Villanueva, 765 S.W.2d 809, 810 (Tex. App.—Dallas 1988, writ denied).

638. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965); *In re* King's Estate, 150 Tex. 662, 664-65, 244 S.W.2d 660, 661 (1951); *Raw Hide Oil & Gas, Inc.*, 766 S.W.2d at 276; Wilson v. Goodyear Tire & Rubber Co., 753 S.W.2d 442, 448 (Tex. App.—Texarkana 1988, writ denied); Otis Elevator Co. v. Joseph, 749 S.W.2d 920, 923 (Tex. App.—Houston [1st Dist.] 1988, no writ).

639. Hickey v. Couchman, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied); *Raw Hide Oil & Gas*, 776 S.W.2d at 275-76.

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supports its nonexistence.[640] Whether the great weight challenge is to a finding or a nonfinding, a court of appeals may reverse and remand a case for a new trial when the court concludes that the finding or nonfinding is against the great weight and preponderance of the evidence.[641]

In reviewing great weight points that complain of a jury's failure to find a fact, the supreme court has admonished the courts of appeals to be mindful that the jury was not convinced by a preponderance of the evidence.[642] In such cases, the courts of appeals may not reverse simply because they conclude that the evidence preponderates toward an affirmative answer.[643] The courts of appeals may only reverse when the great weight of the evidence supports an affirmative answer.[644] While the courts of appeals may "unfind" certain facts, they cannot affirmatively find facts that would be the basis of a rendition. The appellate courts may only reverse and remand for a new trial.[645]

3. *Pool* and the Constitutional Conflict Between the Right to Trial by Jury and Courts of Appeals' Conclusive Jurisdiction over Issues of Fact

In 1891, the Texas Constitution was amended to provide that "the decision of [the courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error."[646] This provision in the constitution acts as a limitation on the judicial authority of the supreme court and confines its jurisdiction to questions of law.[647] The courts of appeals conclusive jurisdiction over issues of "fact," however, is complicated by the Texas Bill of Rights, which provides that

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640. *Cain*, 709 S.W.2d at 176; *Dyson*, 692 S.W.2d at 457; Taylor v. Goulding, 497 S.W.2d 944, 945 (Tex. 1973); *In re* King's Estate, 150 Tex. at 664-65, 244 S.W.2d at 661; Hopson v. Gulf Oil Corp., 150 Tex. 1, 11, 237 S.W.2d 352, 358 (1951); *Raw Hide Oil & Gas*, 766 S.W.2d at 276; *Wilson*, 753 S.W.2d at 448.

641. Ames v. Ames, 776 S.W.2d 154, 158 (Tex. 1989); Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988).

642. Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988).

643. *Id.*

644. *Id.*

645. Texas Nat'l Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986); Carr v. Norstock Bldg. Sys., Inc., 767 S.W.2d 936, 943 (Tex. App.—Beaumont 1989, no writ).

646. TEX. CONST. art. V, § 6; *see* E-Z Mart Stores, Inc. v. Havner, 832 S.W.2d 368, 369 (Tex. App.—Texarkana 1992, writ denied) (referring to provision as "factual conclusivity clause").

647. Choate v. San Antonio & A.P. Ry. Co., 91 Tex. 406, 410, 44 S.W. 69, 69 (1898); *E-Z Mart Stores*, 832 S.W.2d at 369.

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every person has a "right of trial by jury"[648] and that this right "shall remain inviolate."[649]

In 1898, only seven years after the Texas Constitution was amended, the supreme court recognized the potential constitutional conflict and observed that Article V, Section 6, which give courts of appeals conclusive jurisdiction over questions of fact, "was not to enlarge their power over questions of fact but to restrict, in express terms, the jurisdiction of the supreme court and to confine it to questions of law."[650] Equally important, the court also recognized that the courts of appeals' jurisdiction does not give them the authority to substitute their finding for a jury's finding when the record contains evidence of, and gives equal support to, inconsistent inferences in support of the jury's finding.[651]

Almost seventy-five years later, in *In re King's Estate*,[652] the supreme court established that it might accept jurisdiction, not-withstanding Texas Constitution Article V, Section 6, to determine if a correct legal standard had been applied by the courts of appeals.[653] After *In re King's Estate*, the supreme court continued to review factual insufficiency points when the court of appeals utilized an incorrect legal principle.[654] Subsequently, in *Dyson v. Olin Corp.*,[655] the

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648. TEX. CONST. art. V, § 10; *see also* TEX. R. CIV. P. 226a (requiring trial judge to admonish jury that they "are the sole judges of the credibility of the witnesses and the weight to be given their testimony . . . .").

649. TEX. CONST., art. I, § 15.

650. *Choate*, 91 Tex. at 410, 44 S.W.2d at 69.

651. *Id.* at 409-10, 44 S.W.2d at 69. The court's admonition was often repeated prior to the issue squarely confronting the supreme court in *Cropper*. Cropper v. Caterpillar Tractor Co., 754 S.W.2d 646, 651 (Tex. 1988) (stating that courts of appeals may only "unfind" facts and reverse, but cannot usurp jury's fact-finding function); *see also* Pool v. Ford Motor Co., 715 S.W.2d 629, 633-35 (Tex. 1986) (finding that court of appeals may reverse trial court's fact finding only if contrary to overwhelming weight of evidence); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985) (holding that court of appeals may only evaluate sufficiency of evidence to support lower court's judgment but may not decide factual issues as basis for judgment); *In re* King's Estate, 150 Tex. 662, 666, 244 S.W.2d 660, 662 (1951) (indicating that jury verdict cannot be overturned by court of appeals simply because different inferences or conclusions could have been derived by jury); Benoit v. Wilson, 150 Tex. 273, 281-82, 239 S.W.2d 792, 797 (1951).

652. 150 Tex. 662, 244 S.W.2d 660 (1951). *In re King's Estate* is a per curiam opinion that dealt only with the scope of review; it simply held that a court of appeals must pass on all dispositive points raised by an appellant. *Id.* at 664-65, 244 S.W.2d at 661-62.

653. *Id.* at 665, 244 S.W.2d at 661.

654. *See* Harmon v. Sohio Pipeline Co., 623 S.W.2d 314, 314-15 (Tex. 1981) (stating that supreme court has jurisdiction to review appellate court's application of rules of law); Garza v. Alviar, 395 S.W.2d 821, 823-24 (Tex. 1965) (indicating that supreme court has power to deter-

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supreme court again concluded that while it does not have jurisdiction over questions of fact, the supreme court does have jurisdiction to determine whether the courts of appeals used the correct rules of law in reaching their conclusions.[656] As the court correctly recognized, the use of the wrong rule of law, a purely legal question, is within the supreme court's jurisdiction.[657] More importantly, in a concurring opinion, Justice Robertson expressly raised the issue of whether the supreme court would continue to adhere to prior case law interpreting Article V, Section 6. Justice Robertson expressed his view that Article V, Section 6 improperly allows the courts of appeals to usurp the jury's fact-finding function.[658]

Justice Robertson's challenge to the continued viability of Article V, Section 6 was raised subsequently in *Pool*.[659] While the supreme court chose "to adhere to previous interpretations that harmonize the two constitutional provisions" and reaffirmed the courts of appeals' jurisdiction to review cases for factual insufficiency of the evidence,[660] the supreme court also held that it had the authority to review the courts of appeals' opinions to determine if the intermediate courts applied the correct standard of review to the facts.[661] In order to determine whether the courts of appeals applied the correct legal principles to the facts, the supreme court held:

> [T]he courts of appeals, when reversing on insufficiency grounds, should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of

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mine if appellate court had jurisdiction over issue); Puryear v. Porter, 153 Tex. 82, 93, 264 S.W.2d 689, 690 (1954) (declaring that supreme court may remand to appellate court for reconsideration of applicable rules of law).

655. 692 S.W.2d 456 (Tex. 1985).

656. *Id.* at 457.

657. *See id.* (stating that supreme court can, as matter of law, review appellate court's application of rules of law).

658. *Id.* at 458 (Robertson, J., concurring).

659. *Pool*, 715 S.W.2d at 633. The Pools argued that the court of appeals exercised its fact jurisdiction in a manner that undermined the jury verdict in violation of the constitutional right of trial by jury. *Id.*

660. *Id.* at 634.

661. *Id.* at 634-35.

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the verdict.[662]

Pool clearly takes the court's earlier decision in *Dyson* one step further by allowing the supreme court to review a court of appeals's application of the correct legal standard *to the facts*, instead of only determining whether the correct legal standard was utilized.[663] Therefore, the courts of appeals must do more than recite the *Pool* standard of review, they must *prove* that they followed the standard.[664]

The inherent constitutional conflict of the courts of appeals' jurisdiction over questions of fact vis-à-vis the right to trial by jury was raised again and addressed in *Cropper v. Caterpillar Tractor Co.*[665] The supreme court rejected the challenge to the courts of appeals' constitutional obligation to review fact questions, and noted that the right to jury trial and the appellate courts' right to review fact questions are two rights that have "peacefully co-existed for almost one hundred fifty years" and are "thoroughly rooted in our constitution and judicial system."[666] Since the supreme court could not amend the constitution to remove the conflict, it concluded that it was "not prepared to sacrifice either [constitutional provision] for the benefit of the other."[667]

While the supreme court has continued to recognize the courts of appeals' conclusive jurisdiction over questions of fact,[668] the supreme court has circumvented its own constitutional limitation in two interesting and sharply divided cases. In *Lofton v. Texas Brine Corp.*,[669] the supreme court, in a five to four decision, reversed the court of appeals's decision for a second time,[670] holding once again that the

662. *Id.* at 635.

663. *Pool*, 715 S.W.2d at 635.

664. Stewart v. Allied Bancshares, Inc., 770 S.W.2d 837, 838 (Tex. App.—Tyler 1989, writ denied).

665. 754 S.W.2d 646, 648 (Tex. 1988).

666. *Cropper*, 754 S.W.2d at 652.

667. *Id.*; *see* Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988) (reiterating courts of appeals' conclusive jurisdiction over questions of fact); Hurlburt v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 770-71 (Tex. 1987) (Robertson, J., dissenting) (concluding courts of appeals' authority to review sufficiency of jury's fact finding should be eliminated).

668. *See* Coulson v. Lake LBJ Mun. Util. Dist., 781 S.W.2d 594, 597 (Tex. 1989) (stating that "the task of weighing all of the evidence and determining its sufficiency is a power confined exclusively to the court[s] of appeals").

669. 777 S.W.2d 384 (Tex. 1989).

670. *Id.* at 387. The case was reversed for the first time in Lofton v. Texas Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986) (per curiam). The *Lofton* opinion on the first remand is reported at 751 S.W.2d 197 (Tex. 1988).

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jury's finding was supported by factually insufficient evidence.[671] The court presumably reversed the court of appeals's second opinion pursuant to *Pool* for a third review of the case. The fundamental problem with the decision is that the court, as Justice Gonzalez predicted in *Pool*,[672] was using *Pool* to second guess the courts of appeals's constitutional prerogative to judge the factual sufficiency of the evidence in a case.[673] While the supreme court again recognized its lack of jurisdiction to determine the factual sufficiency of the evidence,[674] nevertheless, it explained in great detail why all of the evidence was sufficient to support the jury's finding.[675] It is clear from the supreme court's "extensive, and unauthorized, analysis"[676] that while the court was unwilling to overrule *Herbert* and *Cropper*, it was willing to review the court of appeals's factual sufficiency analysis.[677] In his dissent in *Lofton*, Justice Hecht observed that the court, "[s]tymied by the constitution," will "keep reversing the judgment of the court of appeals until it reaches a result that the [c]ourt approves."[678] Subsequently, Justice Gonzalez reiterated Justice Hecht's concern in *Lofton* by noting that what the supreme court "should avoid is the yo-yo effect when a majority of the court keeps reversing the judgment of the court of appeals until it reaches a result that the majority approves."[679]

In *Aluminum Co. of America v. Alm*,[680] the supreme court circumvented again the court of appeals's constitutionally binding conclu-

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671. *Lofton*, 777 S.W.2d at 387.

672. *Pool*, 715 S.W.2d at 633. In his concurring opinion, Justice Gonzalez expressed fear that the supreme court would use Pool "to second guess the courts of appeals, thereby interfering with their conclusive jurisdiction over questions of fact. *Id.* at 638 (Gonzalez, J., concurring).

673. *Lofton*, 777 S.W.2d at 387-88 (Gonzalez, J., dissenting); *id.* at 388-89 (Hecht, J., dissenting, joined by Phillips, C.J., & Cook, J.).

674. *Id.* at 387.

675. *Id.* at 386-87.

676. *Id.* at 388 (Hecht, J., dissenting).

677. *Lofton*, 777 S.W.2d at 388 (Hecht, J., dissenting).

678. *Id.*

679. Havner v. E-Z Mart Stores, Inc., 846 S.W.2d 286, 286 (Tex. 1993) (Gonzales, J., concurring opinion on denial of application for writ of error) (citing *Lofton*, 720 S.W.2d at 804 (per curiam) (remand for second factual sufficiency review)); *Lofton*, 777 S.W.2d at 387 (remand for third factual sufficiency review); *see also* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 533-39 (1991) (tracking supreme court's inconsistent findings in reversing courts of appeals' cases).

680. 785 S.W.2d 137 (Tex. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 135, 112 L. Ed. 2d 102 (1990).

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sion that the jury's finding of gross negligence was supported by factually insufficient evidence.[681] In another five to four decision, a deeply divided court reversed the court of appeals's conclusion and held that Alcoa was grossly negligent as a matter of law.[682] Ignoring the evidence of care introduced by Alcoa,[683] the court avoided the court of appeals's analysis of the factual sufficiency of the evidence and concluded that Alcoa was grossly negligent as a matter of law, a legal issue over which the supreme court has jurisdiction.[684] It appears the dissenters accurately summarized the real meaning of the supreme court's decision: Whenever a majority of the court is dissatisfied with a court of appeals' conclusion on a factual sufficiency point, it may impose any result it chooses "merely by holding that a party proved the necessary facts conclusively, i.e., as a matter of law."[685]

While most practitioners and courts assume that the inherent conflict between the court of appeals's constitutional and conclusive prerogative to review factual insufficiency challenges and a person's constitutional right of trial by jury had been resolved, it is clear that the justices on the supreme court at the time of *Lofton* and *Alm* were deeply divided on the issue. The recent concurring and dissenting opinions on denial of application for writ of error in *Havner v. E-Z Mart Stores, Inc.*[686] indicate that the questions surrounding the courts of appeals' constitutional conclusive jurisdiction over questions of fact may not be finally resolved.[687] In any event, appellate practitioners must be aware of the potential conflict on the court and understand

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681. *Id.* at 141 (Gonzalez, J., dissenting, joined by Phillips, C.J., Cook & Hecht, JJ.).

682. *Id.* at 140.

683. *Id.* at 143 (Gonzalez, J., dissenting).

684. *Alm*, 785 S.W.2d at 141 (Gonzalez, J., dissenting).

685. *Id.* at 143 (Gonzalez, J., dissenting).

686. *Compare* 846 S.W.2d 286, 186 (Tex. 1993) (Gonzalez, J., concurring on denial of application for writ of error) (reaffirming that supreme court must not second-guess courts of appeals' factual sufficiency review) *with id.* at 288 & n.5 (Doggett, J., dissenting on denial of application for writ of error, joined by Gammage & Spector, JJ.) (lamenting the court's refusal to consider plaintiff's points of error objecting to the "legal standard employed by the court of appeals' in its factual sufficiency review). *See also* May v. United Servs. Ass'n of Am., 844 S.W.2d 666, 674 (Tex. 1992) (Doggett, J., dissenting) (accusing majority of reweighing evidence to determine its factual sufficiency).

687. *See* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 557 (1991) (noting that "[a]fter *Cropper*, the power of courts of appeals to order new trials on factual sufficiency grounds seems to be settled, *at least for the time being*") (emphasis added).

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that the inherent constitutional conflict remains. Because of this vexing problem, appellate practitioners should brief the facts and the appropriate legal standard in detail and with complete accuracy when raising factual sufficiency points to a court of appeals. If a court of appeals reverses a jury finding or nonfinding for factual insufficiency, and uses any language that may be construed as an "inappropriate standard of review" or as a "legal conclusion," an able opponent will surely seek review in the supreme court. Given the supreme court's decisions in *Lofton*, *Alm*, and *E-Z Mart*, appellate practitioners should not assume that the supreme court will not review in some manner the court of appeals's disposition of the factual challenge.

VIII. CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE IN NONJURY TRIALS

In any case or issue tried to the court without a jury, any party may request the court to prepare findings of fact and conclusions of law.[688]

A. *Findings of Fact Filed*

1. With Statement of Facts

While findings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon jury questions,[689] the trial judge's "findings of fact are not conclusive when a complete statement of facts appears in the record."[690] The judge's "findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing the evidence supporting a jury's answer."[691] Although a trial court's conclusions of law may

688. TEX. R. CIV. P. 296.

689. City of Clute v. City of Lake Jackson, 559 S.W.2d 391, 395 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

690. Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex. 1985); Stephenson v. Perlitz, 537 S.W.2d 287, 289 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.). Where a trial court files its findings of fact late, "the error is harmless error absent some showing that the late filing injured the complaining party." Ford v. Darwin, 767 S.W.2d 851, 856 (Tex. App.—Dallas 1989, writ denied).

691. Zieben v. Platt, 786 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1990, no writ); *e.g.*, Southern States Transp., Inc. v. Texas, 774 S.W.2d 639, 640 (Tex. 1989); Criton Corp. v. Highlands Ins. Co., 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied); Burrows v. Miller, 797 S.W.2d 358, 360-61 (Tex. App.—Tyler 1990, no writ); Autohaus, Inc. v. Aguilar, 794 S.W.2d 459, 461 (Tex. App.—Dallas 1990), *writ denied per curiam*, 800 S.W.2d 853 (Tex. 1991); NCL Studs, Inc. v. Jandl, 792 S.W.2d 182, 187 (Tex.

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not be challenged for factual insufficiency, the trial court's conclusions drawn from the facts may be reviewed to determine their correctness.[692]

2. Without Statement of Facts

If no statement of facts is made part of the record on appeal, the reviewing court presumes that sufficient evidence was introduced to support the trial court's findings of fact and conclusions of law and the judgment based upon the findings and conclusions.[693]

B. *Findings of Fact Not Requested and Not Filed*

1. With Statement of Facts

If findings of fact or conclusions of law are neither filed nor requested, the judgment of the trial court implies all necessary findings of fact to support it are present,[694] provided: (1) "the proposition is one raised by the pleadings and supported by the evidence"; and (2) "the trial judge's decision can be sustained on any reasonable theory that is consistent with the evidence and the applicable law, considering only the evidence favorable to the decision."[695] To prevail, "the

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App.—Houston [1st Dist.] 1990, writ denied); Aerospatiale Helicopter Corp. v. Universal Health Servs., Inc., 778 S.W.2d 492, 497 (Tex. App.—Dallas 1989, writ denied), *cert. denied*, 498 U.S. 854 (1990); Valencia v. Garza, 765 S.W.2d 893, 896 (Tex. App.—San Antonio 1989, no writ); Okon v. Levy, 612 S.W.2d 938, 941 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); First Nat'l Bank v. Kinabrew, 589 S.W.2d 137, 146 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

692. Mercer v. Bludworth, 715 S.W.2d 693, 697 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

693. Mays v. Pierce, 154 Tex. 487, 493, 281 S.W.2d 79, 82 (1955); Tripp Village Joint Venture v. MBank Lincoln Centre, N.A., 774 S.W.2d 746, 751 (Tex. App.—Dallas 1989, writ denied); Alexander v. Barlow, 671 S.W.2d 531, 535 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

694. Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 83 (Tex. 1992); Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990); Roberson v. Robinson, 768 S.W.2d 280, 281 (Tex. 1989); Lemons v. EMW Mfg. Co., 747 S.W.2d 372, 373 (Tex. 1988); *In re* W.E.R., 669 S.W.2d 716, 717 (Tex. 1984); Burnett v. Motyka, 610 S.W.2d 735, 736 (Tex. 1980); Goodyear Tire & Rubber Co. v. Jefferson Constr. Co., 565 S.W.2d 916, 918 (Tex. 1978); Buchanan v. Byrd, 519 S.W.2d 841, 842 (Tex. 1975); Stum v. Stum, 845 S.W.2d 407, 410 (Tex. App.—Fort Worth 1992, no writ); Giangrosso v. Crosley, 840 S.W.2d 765, 769 (Tex. App.—Houston [1st Dist.] 1992, no writ); Oak v. Oak, 814 S.W.2d 834, 838 (Tex. App.—Houston [14th Dist.] 1991, writ denied); Schoeffler v. Denton, 813 S.W.2d 742, 745 (Tex. App.—Houston [14th Dist.] 1991, no writ); Marynick v. Bockelmann, 773 S.W.2d 665, 667 (Tex. App.—Dallas 1989), *rev'd on other grounds*, 788 S.W.2d 569 (Tex. 1990).

695. Austin Area Teachers Fed. Credit Union v. First City Bank - Northwest Hills, N.A.,

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appellant may show that the undisputed evidence *negatives* one or more of the elements essential to the decision; or he may show that the appellee's pleadings omit one or more of the essential elements, and that the trial court was confined to the pleadings."[696] However, when a statement of facts is a part of the record, the legal and factual sufficiency of the implied findings may be challenged on appeal in the same manner as jury findings or a trial court's findings of fact are challenged.[697] The applicable standard of review is the same as that applied in the review of jury findings or a trial court's findings of fact.[698] When the implied findings of fact are supported by the evidence, the appellate court must uphold the judgment of the trial court on any theory of law applicable to the case.[699] In this determination, the appellate court will consider only the evidence most favorable to the implied factual findings and will disregard all opposing or contradictory evidence.[700]

2. Without Statement of Facts

When there are no findings of fact and conclusions of law, and no statement of facts included in the record on appeal, the reviewing court presumes that all facts necessary to support the judgment have been found.[701] Only in an exceptional case, "where fundamental error

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825 S.W.2d 795, 801 (Tex. App.—Austin 1992, writ denied); Brodhead v. Dodgin, 824 S.W.2d 616, 619-20 (Tex. App.—Austin 1991, writ denied); Friedman v. New Westbury Village Assoc., 787 S.W.2d 154, 157 (Tex. App.—Houston [1st Dist.] 1990, no writ); Franklin v. Donoho, 774 S.W.2d 308, 311 (Tex. App.—Austin 1989, no writ).

696. *Austin Area Teachers*, 825 S.W.2d at 801; *Brodhead*, 824 S.W.2d at 620; *Franklin*, 774 S.W.2d at 311.

697. *Heine*, 835 S.W.2d at 84; *Roberson*, 768 S.W.2d at 281; Las Vegas Pecan & Cattle Co. v. Zavala County, 682 S.W.2d 254, 256 (Tex. 1984); *Burnett*, 610 S.W.2d at 736; *Giangrosso*, 840 S.W.2d at 769; Money of the United States in the Amount of $8,500 v. State, 774 S.W.2d 788, 791 (Tex. App.—Houston [14th Dist.] 1989, no writ); National Bugmobiles, Inc. v. Jobi Properties, 773 S.W.2d 616, 620 (Tex. App.—Corpus Christi 1989, writ denied).

698. *Heine*, 835 S.W.2d at 83-84; *Roberson*, 768 S.W.2d at 281; *Las Vegas Pecan & Cattle Co.*, 682 S.W.2d at 256; *Burnett*, 610 S.W.2d at 736; *Money of the United States*, 774 S.W.2d at 791; *National Bugmobiles, Inc.*, 773 S.W.2d at 620.

699. Point Lookout West, Inc. v. Whorton, 742 S.W.2d 277, 278 (Tex. 1987); Allen v. Allen, 717 S.W.2d 311, 313 (Tex. 1986); *In re* W.E.R., 669 S.W.2d at 717; Lassiter v. Bliss, 559 S.W.2d 353, 358 (Tex. 1978); *Giangrosso*, 840 S.W.2d at 769; Weng Enters., Inc. v. Embassy World Travel, Inc., 837 S.W.2d 217, 223 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Marynick*, 773 S.W.2d at 667; *see also* Lute Riley Motors, Inc. v. T. C. Crist, Inc., 767 S.W.2d 439, 440 (Tex. App.—Dallas 1988, writ denied) (stating that findings of fact and conclusions of law not requested timely).

700. Renfro Drug Co. v. Lewis, 149 Tex. 507, 513, 235 S.W.2d 609, 613 (1950).

701. Guthrie v. National Homes Corp., 394 S.W.2d 494, 495 (Tex. 1965); Commercial

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is presented, is an appellant entitled to a reversal of the trial court's judgment."[702]

C. *Findings of Fact Requested Properly But Not Filed*

1. With Statement of Facts

Pursuant to Texas Rules of Civil Procedure 296 and 297, upon a proper request by either party, the trial judge must present and file written findings of fact and conclusions of law.[703] When the statement of facts is presented to the appellate court for review, harm is presumed and the appellate court must reverse the judgment unless the record affirmatively shows that no injury resulted from the trial court's failure to comply with Rule 296.[704] "The test of whether there is harm depends upon whether the circumstances of the particular case would require an appellant to have to guess the reason or reasons that the trial judge has ruled against [him or her]."[705] In factually complicated situations, when there are two or more possible grounds for recovery or defense, an undue burden is placed on an appellant[706] because the appellant is prevented from making a proper presentation of the case to the appellate court.[707]

If the record does not show plainly that the appellant suffered no injury by the trial court's failure to file findings of fact and conclu-

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Credit Corp. v. Smith, 143 Tex. 612, 616, 187 S.W.2d 363, 365 (1945); Stum v. Stum, 845 S.W.2d 407, 416 (Tex. App.—Fort Worth 1992, n.w.h.); Dueitt v. Dueitt, 802 S.W.2d 859, 864 (Tex. App.—Houston [1st Dist.] 1991, no writ); Carns v. Carns, 776 S.W.2d 603, 604 (Tex. App.—Tyler 1989, no writ); Bard v. Frank B. Hall & Co., 767 S.W.2d 839, 845 (Tex. App.—San Antonio 1989, writ denied); Ette v. Arlington Bank of Commerce, 764 S.W.2d 594, 595 (Tex. App.—Fort Worth 1989, no writ); Cloer v. Ford & Calhoun GMC Truck Co., 553 S.W.2d 183, 185 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

702. *Carns*, 776 S.W.2d at 604; *Ette*, 764 S.W.2d at 595.

703. TEX. R. CIV. P. 296, 297.

704. Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989); Wagner v. Riske, 142 Tex. 337, 343, 178 S.W.2d 117, 120 (1944); Sheldon Pollack Corp. v. Pioneer Concrete, 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied); Castle v. Castle, 734 S.W.2d 410, 412 (Tex. App.—Houston [1st Dist.] 1987, no writ); Carr v. Hubbard, 664 S.W.2d 151, 153 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Lee v. Thornton, 658 S.W.2d 234, 235 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

705. *Sheldon Pollack Corp.*, 765 S.W.2d at 845; *e.g.*, *In re* O.L., 834 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1992, no writ).

706. Guzman v. Guzman, 827 S.W.2d 445, 446-47 (Tex. App.—Corpus Christi), *writ denied*, 843 S.W.2d 486 (Tex. 1992).

707. *In re* O.L., 834 S.W.2d at 418; Eye Site, Inc. v. Blackburn, 750 S.W.2d 274, 277 (Tex. App.—Houston [14th Dist.] 1988), *rev'd on other grounds*, 796 S.W.2d 160 (Tex. 1990); Anzaldua v. Anzaldua, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1987, writ denied).

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sions of law as requested, the proper remedy is not to reverse the trial court's judgment. Instead, the appellate court should abate the appeal and order the trial court to make the appropriate findings and conclusions, and to certify those findings to the appellate court for review pursuant to Texas Rule of Appellate Procedure 81(a).[708]

2. Without Statement of Facts

When a party properly requests the trial court to file findings of fact and conclusions of law, and a statement of facts is not presented to the appellate court for review, the appellate court presumes that the evidence was sufficient and that "every fact necessary to support the findings and judgment within the scope of the pleadings was proved at trial."[709]

IX. OTHER EVIDENTIARY REVIEW STANDARDS

A. *Clear and Convincing Evidence*

The clear and convincing evidence standard is applied in limited situations. Normally, the preponderance of the evidence standard controls in most civil proceedings. However, in some cases, the courts apply the clear and convincing evidence standard.

Termination of parental rights is one example. Because termination of parental rights is a drastic remedy and is of such weight and gravity, due process requires the petitioner to justify termination by "clear and convincing evidence."[710] This standard is defined as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth or the allegations sought to be established."[711] The clear and convincing standard is an intermediate standard of proof, "falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt stan-

708. TEX. R. APP. P. 81(a); *Magallanes*, 763 S.W.2d at 773; City of Los Fresnos v. Gonzalez, 830 S.W.2d 627, 630 (Tex. App.—Corpus Christi 1992, no writ); Electronic Power Design, Inc. v. R.A. Hanson Co., 821 S.W.2d 170, 171-72 (Tex. App.—Houston [14th Dist.] 1991, no writ).

709. Saenz v. Saenz, 756 S.W.2d 93, 95 (Tex. App.—San Antonio 1988, no writ).

710. *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980); Williams v. Texas Dep't of Human Servs., 788 S.W.2d 922, 925 (Tex. App.—Houston [1st Dist.] 1990, no writ); *In re* L.R.M., 763 S.W.2d 64, 65 (Tex. App.—Fort Worth 1989, no writ) (quoting *In re* G.M., 596 S.W.2d at 847).

711. *In re* G.M., 596 S.W.2d at 847; *Williams*, 788 S.W.2d at 926; *In re* L.R.M., 763 S.W.2d at 65.

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dard of criminal proceedings."[712] On appeal challenging the fact finding made on a clear and convincing standard, the appellate court reviews the record to determine if the fact finder could reasonably conclude that the fact was highly probable.[713] The court must consider all of the evidence in making this determination.[714] The court of appeals will sustain a challenge to the sufficiency of the evidence under this standard "if the fact finder could not have reasonably found that the fact was established by clear and convincing evidence."[715]

The more onerous requirement of clear and convincing evidence has been mandated also by statute in civil involuntary commitments.[716] Presumably, the intermediate appellate standard of review applicable in involuntary termination of parent-child relationships, as adopted in *In re G.M.*,[717] is applicable in involuntary commitment cases.[718]

B. *Administrative Agency Rulings*

The Administrative Procedure and Texas Register Act (APTRA)[719] sets forth six distinct bases for reversal of an administrative order.[720] The traditional substantial evidence rule is simply one of the

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712. *In re* G.M., 596 S.W.2d at 847; *Williams*, 788 S.W.2d at 925; *In re* L.R.M., 763 S.W.2d at 67.

713. *Williams*, 788 S.W.2d at 926; Wetzel v. Wetzel, 715 S.W.2d 387, 389 (Tex. App.—Dallas 1986, no writ).

714. *In re* D. E., 761 S.W.2d 596, 599 (Tex. App.—Fort Worth 1988, no writ).

715. Neal v. Texas Dep't of Human Servs., 814 S.W.2d 216, 222 (Tex. App.—San Antonio 1991, writ denied); *Williams*, 788 S.W.2d at 296; *In re* L.R.M., 763 S.W.2d at 64.

716. TEX. HEALTH & SAFETY CODE ANN. § 574.034(a) (Vernon 1992).

717. 596 S.W.2d 846 (Tex. 1980).

718. *See* K.L.M. v. State, 735 S.W.2d 324, 326 (Tex. App.—Fort Worth 1987, no writ) (court of appeals must review all evidence to determine if evidence was sufficient to produce firm belief or conviction in fact finder of allegations plead).

719. TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e) (Vernon 1986 & Supp. 1993).

720. *Id.* Section 19(e) provides:

> The scope of judicial review of agency decisions is as provided by the law under which review is sought. Where the law authorizes appeal by trial de novo, the courts shall try the case in the manner applicable to other civil suits in this state and as though there had been no intervening agency action or decision. Where the law authorizes review under the substantial evidence rule, or where the law does not define the scope of judicial review, the court may not substitute its judgment for that of the agency as to the weight of the evidence on questions committed to agency discretion but may affirm the decision of the agency in whole or in part and shall reverse or remand the case for further proceeding if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

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tests utilized by appellate courts in evaluating agency decisions under APTRA.

1. Substantial Evidence Under the APTRA

In determining whether there is substantial evidence to support an agency's decision, the basic inquiry of the reviewing court traditionally has been whether reasonable minds could have reached the same conclusion that the agency reached.[721] In an appeal from an agency order governed by the substantial evidence rule, the agency order is presumed to be valid and it is the appellant's burden to overcome that presumption.[722] One endeavoring to reverse administrative findings, conclusions, or decisions because of lack of substantial evidence assumes a heavy burden.[723]

At its core, the substantial evidence rule is a reasonableness test or a rational-basis test.[724] If the agency decision is not supported by substantial evidence in the record, or if the decision is arbitrary, capricious, or an abuse of discretion, the decision must be reversed.[725] The scope of review is based upon the reliable and probative evidence in the record as a whole.[726] However, the agency's decision should be

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(1) in violation of constitutional or statutory provisions;
(2) in excess of the statutory of the agency;
(3) made upon unlawful procedure;
(4) affected by other error of law;
(5) not reasonably supported by substantial evidence in view of the reliable and probative evidence in the record as a whole; or
(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

721. Railroad Comm'n of Tex. v. Shell Oil Co., 139 Tex. 66, 79, 161 S.W.2d 1022, 1030 (1942); *see also* Dotson v. Tex. State Bd. of Medical Examiners, 612 S.W.2d 921, 922 (Tex. 1981); Auto Convoy Co. v. Railroad Comm'n of Tex., 507 S.W.2d 718, 722 (Tex. 1974).

722. Texas Health Facilities Comm'n v. Charter Medical-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984); City of San Antonio v. Texas Water Comm'n, 407 S.W.2d 752, 758 (Tex. 1966).

723. *See Charter Medical*, 665 S.W.2d at 452-53 (discussing what appellant must show to be successful on appeal).

724. Railroad Comm'n of Tex. v. Pend Oreille Oil & Gas Co., 817 S.W.2d 36, 41 (Tex. 1991); *Charter Medical*, 665 S.W.2d at 452; *see* William H. Chablee, Comment, *Administrative Law: Journey Through the Administrative Process and Judicial Review of Administrative Actions*, 16 ST. MARY'S L.J. 155, 182-83 (1984) (discussing supreme court's decision in *Charter Medical*).

725. Public Util. Comm'n of Tex. v. Gulf States Util. Co., 809 S.W.2d 201, 210-11 (Tex. 1991).

726. *Id.* at 211.

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affirmed if (1) the findings of the underlying facts in the order fairly support the agency's findings of ultimate fact and conclusions of law, and (2) the evidence presented at the hearing reasonably supports the findings of underlying facts.[727] Resolution of factual conflicts and ambiguities is within the province of the agency, and the goal of the substantial evidence rule is to protect that function.[728] The reviewing court is concerned, then, with the reasonableness of the agency order and not the correctness of the order.[729] In applying this test, the reviewing court may not substitute its judgment as to the weight of the evidence for that of the agency.[730]

2. Arbitrary and Capricious Standard

"Substantial evidence" and "arbitrary and capricious" are two sides of the same coin. If an agency decision is not supported by substantial evidence, then it is deemed to be arbitrary and capricious.[731] However, a decision may be supported by substantial evidence, yet still be arbitrary and capricious and may, therefore, be reversed.[732]

3. Standard of Review Under Non-APTRA Cases

The standard of review for most non-APTRA administrative deci-

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727. Texas Water Comm'n v. Customers of Combined Water Sys., Inc., 843 S.W.2d 678, 681 (Tex. App.—Austin 1992, n.w.h.); *see also* Public Util. Comm'n of Tex. v. GTE-SW, 833 S.W.2d 153, 159 (Tex. App.—Austin 1992, writ denied) (substantial evidence test refers simply to such relevant evidence as reasonable mind might accept as adequate to support conclusion).

728. Texas Alcoholic Beverage Comm'n v. Mini, Inc., 832 S.W.2d 147, 150 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

729. *Pend Oreille Oil & Gas Co.*, 817 S.W.2d at 41 (citing Texas State Bd. of Dental Examiners v. Sizemore, 759 S.W.2d 114, 117 (Tex. 1988); *Charter Medical*, 665 S.W.2d at 452; Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer, 662 S.W.2d 953, 956 (Tex. 1984)).

730. *See id.* (stating that court may not usurp agency's decision).

731. Public Util. Comm'n of Tex. v. Gulf State Util. Co., 809 S.W.2d 201, 211 (Tex. 1991); Texas Health Facilities Comm'n v. Charter-Medical Dallas, Inc., 665 S.W.2d 446, 454 (Tex. 1984).

732. *See* Lewis v. Metropolitan Sav. & Loan Ass'n, 550 S.W.2d 11, 16 (Tex. 1977) (finding that reversal warranted when denial of due process prejudiced substantial rights of litigant); Railroad Comm'n v. Alamo Express, Inc., 158 Tex. 68, 73, 308 S.W.2d 843, 846 (1958) (reversing when agency failed to make findings of fact but based decision on findings in another case); *see also* Public Util. Comm'n v. South Plains Elec. Coop., Inc., 635 S.W.2d 954, 957 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (noting that arbitrary and capricious action will require reversal); Starr County v. Starr Indust. Servs., Inc., 584 S.W.2d 352, 355 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (stating that arbitrary administrative action cannot stand).

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sions is de novo review, unless a statute specifically limits review to the agency record or provides for pure de novo review. A trial court's de novo review of an administrative agency decision requires the court to determine whether substantial evidence exists to support the agency's ruling, but the reviewing court must examine the evidence presented at trial and not the record compiled by the agency.[733]

X. CONCLUSIONS OF LAW

Conclusions of law, which are always reviewable,[734] "will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence."[735] Conclusions of law will not be reversed unless they are erroneous as a matter of law.[736] "Incorrect conclusions of law will not require reversal, however, if the controlling finding of facts will support a correct legal theory."[737]

XI. PRESUMPTIONS FROM AN INCOMPLETE RECORD

There can be no appeal in the absence of a transcript.[738] Without a complete statement of facts or a complete transcript, the appellate court will presume that the evidence before the trial court supported its judgment.[739] Stated another way, when an appellant fails to bring forward a complete record on appeal, it is presumed that the omitted

733. Mary Lee Found. v. Texas Employment Comm'n, 817 S.W.2d 725, 727 (Tex. App.—Texarkana 1991, writ denied) (citing Mercer v. Ross, 761 S.W.2d 830, 831 (Tex. 1986)); Arrellano v. Texas Employment Comm'n, 810 S.W.2d 767, 770 (Tex. App.—San Antonio 1991, writ denied).

734. Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex. App.—Austin 1992, writ denied); Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex. 1985); Muller v. Nelson, Sherrod & Carter, 563 S.W.2d 697, 702 (Tex. Civ. App.—Fort Worth 1978, no writ).

735. Kotis v. Nowlin Jewelry, Inc., 844 S.W.2d 920, 922 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Westech Eng'g, Inc.*, 835 S.W.2d at 196; Simpson v. Simpson, 727 S.W.2d 662, 664 (Tex. App.—Dallas 1987, no writ).

736. *Westech Eng'g, Inc.*, 835 S.W.2d at 196; Mercer v. Bludworth, 715 S.W.2d 693, 697 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

737. *Kotis*, 844 S.W.2d at 922; *Westech Eng'g, Inc.*, 835 S.W.2d at 196; Valencia v. Garza, 765 S.W.2d 893, 898 (Tex. App.—San Antonio 1989, no writ).

738. Western Credit Co. v. Olshan Enter., Inc., 714 S.W.2d 137, 138 (Tex. App.—Houston [1st Dist.] 1986, no writ).

739. Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987); The Englander Co. v. Kennedy, 428 S.W.2d 806, 806-07 (Tex. 1968); Murray v. Devco, Ltd., 731 S.W.2d 555, 557 (Tex. 1986); Haynes v. McIntosh, 776 S.W.2d 784, 785 (Tex. App.—Corpus Christi 1989, error denied); E.B. v. Texas Dep't of Human Servs., 766 S.W.2d 387, 388 (Tex.

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portions are not relevant to the disposition of the appeal.[740] This presumption precludes the reviewing court from finding reversible error[741] because a reviewing court must examine the entire record to determine whether an error was "reasonably calculated to cause, and probably did cause, the rendition of an improper judgment."[742] An incomplete statement of facts prevents the reviewing court from determining whether a particular trial court ruling is reversible error in the context of the entire case.[743]

When there is no statement of facts, appellate court review is limited generally to complaints involving: errors of law, erroneous pleadings or rulings thereon, an erroneous charge, irreconcilable conflicts of jury findings, summary judgments, and fundamental error.[744] However, when the appellant, through no fault of his own, is unable to obtain a statement of facts, the appellate court may reverse the judgment.[745]

There is an exception to the general rule requiring a complete statement of facts on appeal. Under Texas Rule of Appellate Procedure 53(d), an appellant may bring forward a partial statement of facts if he includes in his request for a partial statement of facts, a statement of the points to be relied upon appeal. When an appellant complies with this rule, there is a presumption on appeal that nothing omitted from the record is relevant to any of the specified points or to the disposition of the case on appeal.[746] However, the failure of the appellant to comply with Rule 53(d) will preclude the reviewing court from finding reversible error.[747]

App.—Austin 1989), *rev'd on other grounds*, 802 S.W.2d 647 (Tex. 1990); Collins v. Williamson Printing Corp., 746 S.W.2d 489, 492-93 (Tex. App.—Dallas 1988, no writ).

740. Guthrie v. National Homes Corp., 394 S.W.2d 494, 495 (Tex. 1965); Protechnics Int'l, Inc. v. Tru-Tag Sys., Inc., 843 S.W.2d 734, 735 (Tex. App.—Houston [14th Dist.] 1992, n.w.h.).

741. Christiansen v. Prezelski, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam).

742. TEX. R. APP. P. 81(b).

743. *Christiansen*, 782 S.W.2d at 843.

744. *Protechnics Int'l, Inc.*, 843 S.W.2d at 735; *Collins*, 746 S.W.2d at 491; *see also* Bexar County Criminal Dist. Attorney v. Mayo, 773 S.W.2d 642, 643 (Tex. App.—San Antonio 1989, no writ) (stating that conclusions of law will not bind appellate court if erroneous).

745. Smith v. Smith, 544 S.W.2d 121, 123 (Tex. 1976).

746. Producers Constr. Co. v. Muegge, 669 S.W.2d 717, 718 (Tex. 1984); *E.B.*, 766 S.W.2d at 388.

747. *Christiansen*, 782 S.W.2d at 843; Kwik Wash Laundries, Inc. v. McIntyre, 840 S.W.2d 739, 741 (Tex. App.—Austin 1992, no writ).

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XII. ARBITRATION AWARDS

Arbitrations under state law may be conducted under the common law,[748] or pursuant to the Texas General Arbitration Act.[749] Statutory arbitration is cumulative of the common law.[750] An arbitration award under the common law may be set aside by a court only if the decision is "tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment."[751] In addition to the common law grounds for setting aside an arbitration award, the statute authorizes a court to vacate an award if: the arbitrators exceed their powers, the arbitrators refuse to postpone a hearing when a party shows sufficient cause for a postponement, the arbitrators refuse to hear evidence material to the controversy, or so conduct the hearing as to prejudice substantially the rights of a party.[752] The statute also authorizes a court to vacate an award "if there was no arbitration agreement and the issue was not adversely determined in proceedings" to compel or stay arbitration "and the party did not participate in the arbitration proceeding without raising the objection."[753] Under the statute, an award may be modified by a court if (1) the arbitrators miscalculated the figures; (2) the arbitrators inaccurately described any person, thing, or property; (3) the arbitrators made an award on an issue not submitted to them; (4) the award may be corrected without affecting the merits of the issues submitted; or (5) the award is imperfect in form only.[754]

Because arbitration awards are favored by the courts as a means of disposing of disputes, the courts indulge every reasonable presumption in favor of upholding the award.[755] An arbitration award has the

748. Riha v. Smulcer, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ requested).

749. TEX. REV. CIV. STAT. ANN. art. 224 (Vernon Supp. 1993).

750. *Riha*, 843 S.W.2d at 292 (citing House Grain Co. v. Obst, 659 S.W.2d 903, 905 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)).

751. *Id.*

752. TEX. REV. CIV. STAT. ANN. art. 237, § A(2)-(3) (Vernon).

753. *Id.* § A(5). Like the common law, Section 1 provides that an award may be vacated if "procured by corruption, fraud or other undue means," and Section 2 provides that an award may be vacated if any party's rights are prejudiced because an arbitrator was not impartial, was corrupt, or was guilty of misconduct or willful misbehavior. *Id.* § A(1)-(2); *Riha*, 843 S.W.2d at 292.

754. TEX. REV. CIV. STAT. ANN. art. 238, § A(1)-(3) (Vernon 1973).

755. *Riha*, 843 S.W.2d at 292, 294; Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); House Grain Co. v. Obst, 659 S.W.2d 903, 905 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

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same effect as a trial court judgment, and the reviewing court may not substitute its judgment for the arbitrator's merely because it would have reached a different result.[756] The scope of review is the entire record.[757]

XIII. FRIVOLOUS APPEALS

If an appeal is taken for delay and without sufficient cause, the supreme court or court of appeals may award each prevailing appellee or respondent an amount not to exceed 10% of the amount of damages awarded to such appellee or respondent as damages against such appellant or petitioner.[758] If there is no money damage award, then the court may award each prevailing appellee or respondent a damages award amount not to exceed ten times the total taxable costs.[759] The damages may be awarded on motion of a party or by the court sua sponte.[760] Because meritless litigation constitutes an unnecessary burden on the court and the parties to litigation, Texas Rule of Appellate Procedure 84 shifts to the appellant the part of the prevailing party's expenses and burdens of defending a frivolous appeal.[761]

"[T]he right to an appeal is a sacred and valuable right."[762] As a result, a court will only assess frivolous appeal damages "with prudence, caution and after careful deliberation."[763] As long as the argument, even if unconvincing, has a reasonable basis in law and constitutes an informed, good faith challenge to the trial court's judgment, Rule 84 damages are not appropriate.[764] Thus, an appellant's

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756. *Riha*, 843 S.W.2d at 293-94 (citing *Westfall*, 727 S.W.2d at 90).

757. *Id.* at 294.

758. TEX. R. APP. P. 84, 182(b); *see* Ramirez v. Pecan Deluxe Candy Co., 839 S.W.2d 101, 108 (Tex. App.—Dallas 1992, writ denied) (recognizing that court must make two findings: that appeal was brought for delay *and* that such appeal was without sufficient cause).

759. TEX. R. APP. P. 84; *see* TEX. R. APP. P. 182(b) (stating that supreme court may award damages it deems "appropriate").

760. Dolenz v. A__ B__, 742 S.W.2d 82, 86 (Tex. App.—Dallas 1987, writ denied).

761. Roever v. Roever, 824 S.W.2d 674, 677 (Tex. App.—Dallas 1992, no writ); Dolenz v. American Gen. Fire & Cas. Co., 798 S.W.2d 862, 865 (Tex. App.—Dallas 1990, writ denied).

762. Loyd Elec. Co. v. Millett, 767 S.W.2d 476, 484 (Tex. App.—San Antonio 1989, no writ); *see also* Masterson v. Hogue, 842 S.W.2d 696, 698 (Tex. App.—Tyler 1992, no writ) (discussing right to appeal); *In re* Estate of Kidd, 812 S.W.2d 356, 360 (Tex. App.—Amarillo 1991, no writ) (noting party's right to appeal).

763. *Masterson*, 842 S.W.2d at 699; *Loyd Elec. Co.*, 767 S.W.2d at 484.

764. General Elec. Credit Corp. v. Midland Cent. Appraisal Dist., 826 S.W.2d 124, 125 (Tex. 1992) (per curiam).

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right to appellate review will not be penalized, absent a clear showing that the appellant had no reasonable ground to believe the judgment would be reversed.[765] The court must look at the case from the point of view of the advocate and determine whether the appellant had reasonable grounds to believe that the case would be reversed.[766] "Whether the matter is groundless and without sufficient cause must be decided on the basis of objective legal expectations."[767] Some courts have phrased the basis of a damages award simply as lack of merit, rather than performing expressly the two-part analysis indicated by the language of the rule. Thus, an appellant's conscious indifference to settled rules of law has been held to warrant damages.[768]

Pointing out errors in an appellant's brief that are inconsistent with the record will not suffice to show entitlement to damages.[769] However, an appellant's complete failure to advance arguments in support of his position may result in damages.[770] Some courts have held that the failure to file a statement of facts alone demonstrates that the appeal has been taken without sufficient cause.[771] Although one court has stressed that before damages are authorized, the court must determine that an appeal was taken solely for delay,[772] most courts have not been so strict.[773]

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765. Beago v. Ceres, 619 S.W.2d 293, 295 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ). An unconvincing argument does not constitute a frivolous appeal. Smith v. Renz, 840 S.W.2d 702, 706 (Tex. App.—Corpus Christi 1992, writ denied).

766. *Roever*, 824 S.W.2d at 677; *Kidd*, 812 S.W.2d at 360; Naydan v. Naydan, 800 S.W.2d 637, 643 (Tex. App.—Dallas 1990, no writ); Gaines v. Frawley, 739 S.W.2d 950, 956 (Tex. App.—Fort Worth 1987, no writ).

767. Goad v. Goad, 768 S.W.2d 356, 360 (Tex. App.—Texarkana 1988, writ denied), *cert. denied*, 493 U.S. 1021 (1990); *see Roever*, 824 S.W.2d at 677 (finding personal, rather than legal, expectations of prevailing party insufficient).

768. *In re* Estate of Diggs, 733 S.W.2d 681, 687 (Tex. App.—Amarillo 1987, writ denied); Bullock v. Sage Energy Co., 728 S.W.2d 465, 468 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

769. *Gaines*, 739 S.W.2d at 956.

770. Burdett v. Gifford-Hill & Co., 739 S.W.2d 663, 664-65 (Tex. App.—Fort Worth 1987, no writ).

771. *E.g.*, Texas Employers' Ins. Ass'n v. Armstrong, 774 S.W.2d 755, 756-57 (Tex. App.—Houston [1st Dist.] 1989, no writ). *Contra* A.T. Lowry Toyota, Inc. v. Peters, 727 S.W.2d 307, 309 (Tex. App.—Houston [1st Dist.] 1987, no writ).

772. *Gaines*, 739 S.W.2d at 957.

773. Lewis v. Deaf Smith Elec. Co-op., Inc., 768 S.W.2d 511, 514 (Tex. App.—Amarillo 1989, no writ) (quoting Bainbridge v. Bainbridge, 662 S.W.2d 655, 657 (Tex. App.—Dallas 1983, no writ)). "An appeal should not be taken, however, to delay execution of the judgment or to prolong the litigation in the hope of obtaining a more favorable result through negotiation. Besides the damage to the appellee, such an appeal requires judicial time and effort that

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XIV. APPEAL BY WRIT OF ERROR

To appeal by writ of error, the appealing party must show that (1) the petition for writ of error was filed within six months after the final judgment was rendered; (2) by a party to the suit; (3) who was not a participant at trial; and (4) the error is apparent on the face of the record.[774] A writ of error constitutes a direct attack on a default judgment, and when appropriate, affords review of the trial proceedings within the same scope as an ordinary appeal.[775] Generally, "the same standards of review and powers of disposition as govern ordinary direct appeals govern review of a default judgment."[776] However, like summary judgments, "the usual presumption of the validity of the judgment does *not* apply when the reviewing court reviews a judgment by writ of error."[777]

The phrase, "face of the record," simply refers to the entire record of a case in court up to the point at which reference is made to it.[778] On appeal by writ of error, the reviewing court is not limited to a

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would be better spent on meritorious cases." *Id.*; *see also Goad*, 768 S.W.2d at 360 (finding that sanctions may be invoked when there is attempt to further delay resolution of litigation), *cert denied*, 493 U.S. 1021 (1990); *Dolenz*, 742 S.W.2d at 86 (stating that "spurious litigation, unnecessarily burdening parties and courts alike, should not go unsanctioned"); Dallas County Appraisal Dist. v. The Leaves, Inc., 742 S.W.2d 424, 431 (Tex. App.—Dallas 1987, writ denied). The rule does not require that the "delay found by the court result from any particular motivation, financial or otherwise; it is the fact of delay that is important, not the reason." *The Leaves, Inc.*, 742 S.W.2d at 431.

774. General Elec Co. v. Falcon Ridge Apartments, 811 S.W.2d 942, 943 (Tex. 1991); Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985); Brown v. McLennan County Children's Protective Servs., 627 S.W.2d 390, 392 (Tex. 1982); *see* TEX. R. APP. 45 (stating requirements for appealing by writ of error); TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (Vernon 1986) (stating time period for taking writ of error to court of appeals). *See generally* W. Wendell Hall, *Appellate Review of Default Judgments by Writ of Error*, 45 TEX. B.J. 192, 192-94 (Feb. 1988) (discussing procedure used to attack default judgments); W. Wendell Hall, *Appeal, Writ of Error, or Bill of Review . . . Which Should I Choose?*, 1 THE APPELLATE ADVOCATE IV (Summer 1988) (discussing appellate procedures under Texas law).

775. Gunn v. Cavanaugh, 391 S.W.2d 723, 724 (Tex. 1965); Robert S. Wilson Investments No. 16 Ltd. v. Blumer, 837 S.W.2d 860, 861 (Tex. App.—Houston [1st Dist.] 1992, no writ); First Dallas Petroleum, Inc. v. Hawkins, 727 S.W.2d 640, 644-45 (Tex. App.—Dallas 1987, no writ).

776. *Stubbs*, 685 S.W.2d at 644; Lakeside Leasing Corp. v. Kirkwood Atrium Office Park Phase 3, 750 S.W.2d 847, 849 (Tex. App.—Houston [14th Dist.] 1988, no writ).

777. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); *Lakeside Leasing Corp.*, 750 S.W.2d at 849.

778. Barnes v. Barnes, 775 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1989, no writ); *First Dallas Petroleum, Inc.*, 727 S.W.2d at 643.

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review of the transcript,[779] but may refer to all of the papers on file in the case, including the statement of facts, to test the validity of the judgment.[780] In the absence of a statement of facts, the reviewing court may assume that every fact necessary to support the judgment, within the limits of the pleadings, was proved at trial.[781] Therefore, when an appellant fails to bring forward a statement of facts, or when there is no evidence that a statement of facts was not made, the appellant may be held to have failed to establish "error on the face of the record."[782]

XV. BILL OF REVIEW

Texas Rule of Civil Procedure 329b(f) provides that "on expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause . . . ."[783] A bill of review "is the proper method to attack a judgment when the trial court had jurisdiction to render judgment on the merits."[784] The purpose of the bill of review proceeding is to attack directly[785] the former judgment and secure entry of a correct judgment.[786]

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779. Morales v. Dalworth Oil Co., 698 S.W.2d 772, 774 (Tex. App.—Fort Worth 1985, no writ).

780. DSC Finance Corp. v. Moffitt, 815 S.W.2d 551, 551 (Tex. 1991) (per curiam). Extrinsic evidence is not admissible to challenge a judgment on appeal by writ of error. *General Elec. Co.*, 811 S.W.2d at 944; *see* Garcia v. Arbot Green Owners Ass'n, 838 S.W.2d 800, 803 n.2 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (holding that "appropriate remedy when extrinsic evidence is necessary to the challenge of a judgment is by motion for new trial, TEX. R. CIV. P. 320, 324(b)(1), or by [equitable] bill of review"); *Blumer*, 837 S.W.2d at 862 n.1 (finding same).

781. Jaramillo v. Liberty Mut. Fire Ins. Co., 694 S.W.2d 585, 587 (Tex. App.—Corpus Christi 1985, no writ).

782. *Id.*; Salazar v. Tower, 683 S.W.2d 797, 799-800 (Tex. App.—Corpus Christi 1984, no writ).

783. TEX. R. CIV. P. 329b(f).

784. Holloway v. Starnes, 840 S.W.2d 14, 18 (Tex. App.—Dallas 1992, writ denied).

785. A direct attack differs from a collateral attack in that a collateral attack is proper only if the judgment is void. *See* Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987) (stating that void judgment may be collaterally attacked). A judgment is void only when the court had no personal jurisdiction over the party or her property, no subject matter jurisdiction, no jurisdiction to enter the particular judgment, or no capacity to act as a court. *Id.* (citing Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985)). Errors other than lack of jurisdiction render the judgment voidable. *Id.* In a collateral attack, extrinsic evidence may not be used to establish the lack of jurisdiction. *Holloway*, 840 S.W.2d at 18.

786. Austin Indep. Sch. Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973).

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Attacking a judgment by bill of review is an onerous burden.[787] It is an independent equitable proceeding designated to prevent manifest injustice,[788] which permits a trial court to set aside a judgment that is no longer appealable, subject to a motion for new trial,[789] or subject to appeal by writ of error.[790] The "burden on the complainant is harsh because of the justifiable public policy that judgments must become final at some point."[791] Therefore, the grounds on which bills of review are granted are narrow and restricted and will not be relaxed merely because of an apparent injustice.[792]

The rules do not define "sufficient cause" for purposes of a bill of review, but the courts have established several requirements to be entitled to relief by bill of review.[793]

> The narrow essentials that must be alleged and proven are: (1) a meritorious defense to the cause of action alleged to support the judgment; (2) that a party was prevented from making by fraud, accident, or wrongful act of the opposing party; and (3) [that was] unmixed with any fault or negligence on that party's own part.[794]

A bill of review complainant must exhaust all legal remedies available before she may pursue a bill of review to achieve the same result.[795] From the date a complainant learns of the judgment, or by the exercise of due diligence would have learned of it, she must pursue all legal remedies still available.[796] A bill of review is not merely an alternative of review on motion for new trial or upon appeal, and may

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787. *See* W. Wendell Hall, *Appeal, Writ of Error, or Bill of Review . . . Which Should I Choose?*, 1 THE APPELLATE ADVOCATE IV to V (Summer 1988) (discussing bill of review requirements).

788. French v. Brown, 424 S.W.2d 893, 895 (Tex. 1967).

789. Ortega v. First RepublicBank, 792 S.W.2d 452, 453 (Tex. 1990); State v. 1985 Chevrolet Pickup Truck, 772 S.W.2d 447, 448 (Tex. 1989); Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 407-08 (Tex. 1987); Baker v. Goldsmith, 582 S.W.2d 404, 406 (Tex. 1979).

790. General Elec. Co. v. Falcon Ridge Apartments, 811 S.W.2d 942, 944 n.2 (Tex. 1991).

791. *Briscoe*, 722 S.W.2d at 407-08; Steward v. Steward, 734 S.W.2d 43, 434 (Tex. App.—Fort Worth 1987, no writ).

792. *Briscoe*, 722 S.W.2d at 407-08; Alexander v. Hagedorn, 148 Tex. 565, 569, 226 S.W.2d 996, 998 (1950).

793. *Baker*, 582 S.W.2d at 406.

794. Beck v. Beck, 771 S.W.2d 141, 141 (Tex. 1989); *Briscoe*, 722 S.W.2d at 408; *Baker*, 582 S.W.2d at 404, 406-07 (Tex. 1979); Hanks v. Rosser, 378 S.W.2d 31, 34 (Tex. 1964); *Alexander*, 148 Tex. at 568-69, 226 S.W.2d at 998.

795. *See French*, 424 S.W.2d at 895 (noting that party was not entitled to seek equitable relief because party neglected legal remedy).

796. Rizk v. Mayad, 603 S.W.2d 773, 776 (Tex. 1980).

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be urged successfully only when there remains no other method of assailing the judgment.[797] Accordingly, if a party permits a judgment to become final by neglecting to file a motion for new trial or to invoke the right of appeal or appeal by writ of error, then the party is precluded from proceeding on petition for bill of review, unless the complainant shows a good excuse for failure to exhaust adequate legal remedies.[798]

In *State v. 1985 Chevrolet Pickup Truck*,[799] the supreme court set forth the necessary steps to be followed in a bill of review proceeding. First, the petitioner must invoke the equitable powers of the court by filing a petition alleging "factually and with particularity that the prior judgment was rendered as a result of fraud, accident or wrongful act of the opposite party" or as the result of reliance on erroneous information provided by an official court functionary,[800] unmixed with the petitioner's own negligence.[801] The petitioner must further allege, with particularity, sworn facts sufficient to constitute a defense and, as a pretrial matter, present prima-facie proof to support the contention.[802] Before conducting an actual trial on the issues, the trial court must determine whether the complainant's defense is barred as a matter of law.[803] The supreme court has directed that the petitioner be required to present "prima-facie proof of a meritorious defense as a pretrial matter" to assure that "valuable court time is not wasted by conducting a spurious 'full-blown' trial on the merits."[804] A trial of the issues is required if a prima-facie meritorious defense has been shown.[805] If the trial court deems that a prima-facie defense has not been established, it may dismiss the case.[806] The petitioner must open

797. *See generally* 5 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS §§ 29.6-29:12 (rev. 1992) (discussing when bill of review is appropriate).

798. *French*, 424 S.W.2d at 895; *Steward*, 734 S.W.2d at 435.

799. 772 S.W.2d 447 (Tex. 1989).

800. *Id.* at 448 (citing *Baker*, 582 S.W.2d at 408); Levit v. Adams, 841 S.W.2d 478, 481 n.5 (Tex. App.—Houston [1st Dist.] 1992), *rev'd on other grounds*, 36 Tex. Sup. Ct. J. 677 (Mar. 24, 1992) (per curiam).

801. *1985 Chevrolet Pickup Truck*, 772 S.W.2d at 448 (citing *Baker*, 582 S.W.2d at 408).

802. *Id.* A prima-facie meritorious defense is shown when the trial court determines that the complainant's defense is not barred as a matter of law, and that he will be entitled to judgment if no evidence to the contrary is introduced. *Baker*, 582 S.W.2d at 409.

803. *Id.*

804. *Beck*, 771 S.W.2d at 142 (citing *Baker*, 582 S.W.2d at 408-09).

805. *Id.*

806. *Id.*

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and assume the burden of proof on this issue.[807]

Second, the court will conduct a trial if a prima-facie defense has been shown.[808] At this trial, the petitioner must open and assume the burden of proving by a preponderance of the evidence that the judgment was rendered as the result of fraud, accident, wrongful act of the opposite party, or official mistake, unmixed with any negligence of his own.[809] "If the petitioner meets this burden, the factfinder will then determine whether the bill of review defendant, the original plaintiff, has proved the elements of his original cause of action."[810] Once the appellate court finds that a judgment is wrongfully obtained because it is unsupported by the weight of the evidence, "equity is satisfied and the court should grant the requested relief."[811] If the complainant's bill of review is granted, the case proceeds to trial on the issues outlined above, which are reviewed under the same standards as any other trial.

There is an exception to the general rule. A party need not show a meritorious defense if the service of the petition was invalid and the defendant was not given notice at a meaningful time and in a meaningful manner so that the defendant lacked the opportunity to be heard as required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[812] Such a requirement, in the absence of notice, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[813]

XVI. CONCLUSION

Essential to a successful appeal for an appellant or an appellee are application of the appropriate standard of review to the proper scope of review to show error or lack of error and a forceful and persuasive brief that demonstrates the harmfulness or harmlessness of the error.

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807. *Id.*

808. *1985 Chevrolet Pickup Truck*, 772 S.W.2d at 449.

809. *Id.* (citing *Baker*, 582 S.W.2d at 409).

810. *Id.*

811. *Id.*

812. Peralta v. Heights Medical Ctr., Inc., 485 U.S. 80, 86 (1988); Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988); Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d 28, 30 (Tex. App.—Texarkana 1988, no writ).

813. *Lopez*, 757 S.W.2d at 723; *see* Richmond Mfg. Co. v. Fluitt, 754 S.W.2d 359, 360 (Tex. App.—San Antonio 1988, no writ) (finding due process of law is afforded when defendant is properly served with citation, and requiring her to allege facts in her motion for new trial does not conflict with *Peralta*).

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While standards of review are by their very nature imprecise, they provide a focus for the appellate court by identifying the fundamental questions in the case. They also provide a structure for persuasive argument. Although there are certainly no guarantees of a successful outcome in the appellate process, the appellate advocate will be most effective when he or she focuses on the applicable standard of review and demonstrates for the appellate court how that standard mandates the advocated result.

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